

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA,

Plaintiff,

v.

Docket No.
1:10-cv-00569-RJA

Buffalo, New York
August 17, 2011

2:04 p.m.

MARK ELLIOT ZUCKERBERG and
FACEBOOK, INC.,

ORAL ARGUMENT

Defendants.

* * * * *

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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8 Proceedings recorded by mechanical stenography,
9 transcript produced by computer.
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13:43:18 1 **THE CLERK:** Ceglia versus Zuckerberg. Appearing for
14:04:32 2 the Plaintiff is Jeffrey Lake and Paul Argentieri. Appearing
14:04:34 3 for the Defendant is Orin Snyder and Amanda Aycock and Terrance
14:04:39 4 Flynn. We are here for oral arguments on Plaintiff's motion to
14:04:43 5 compel and Defendants' cross motion to compel.

14:04:52 6 **THE COURT:** Good afternoon. Welcome back. I read the
14:04:57 7 papers. We have a court reporter thinking that people may want
14:05:28 8 to have a transcript and if they do, put the people to work
14:05:33 9 here.

14:05:37 10 I've read the papers. I think the first thing to deal
14:05:41 11 with is the issue of Mr. Lake's letter to the Court indicating
14:05:48 12 that the Court's description of items 1 through 4, particularly
14:05:56 13 two documents mentioned in the log that purport to be a contract
14:06:01 14 for StreetFax between the Plaintiff and Mr. Zuckerberg, might
14:06:08 15 not have been correctly -- correctly denominated in the Court's
14:06:15 16 decision in order of Friday afternoon, August the 12th, which we
14:06:18 17 were trying to accommodate the parties so that each side would
14:06:22 18 know to what extent they could adverse to these documents in
14:06:25 19 dispute in the course of today's hearing.

14:06:28 20 And I read Mr. Snyder's response indicating that the
14:06:45 21 Court got it right and that perhaps the Court ought to
14:06:50 22 reconsider item 29 as not being confidential in as much as that
14:06:59 23 those emails were also appended to the complaint, another fact
14:07:05 24 the Court may not have focused on when I wrote the note.

14:07:10 25 Of course, the parties did not make a lot of argument

14:07:15 1 about each and every item so it's somewhat easy to understand
14:07:20 2 how we might not have focused on the fact that those emails were
14:07:25 3 also appended to the contract.

14:07:27 4 I'm here to start off the proceedings by entertaining
14:07:31 5 Mr. Lake's motion, which I suppose can be fairly denominated as
14:07:37 6 a request for reconsideration on that point. I suppose
14:07:42 7 Mr. Snyder's letter could also be considered to be a
14:07:45 8 cross-request for reconsideration as to item 29.

14:07:51 9 And so how did -- how do you -- why do you think the
14:07:59 10 confidentiality of those items should be retained even if from
14:08:07 11 a -- from a drafting point of view there is allegedly some
14:08:14 12 variations between the two documents, one being what looks to be
14:08:18 13 a straight-up software development contract for StreetFax and
14:08:24 14 the other one to have a work-for-hire, which appears to include
14:08:28 15 the reference to the Facebook ownership interest, allegedly
14:08:33 16 created in favor of Mr. Ceglia. Both documents, at least
14:08:42 17 purportedly, given the Plaintiff's proffering of them as
14:08:47 18 confidential, were executed by Mr. Zuckerberg.

14:08:51 19 I guess part of my curiosity is are you -- your
14:08:59 20 argument is that there were in fact two contracts that the
14:09:06 21 StreetFax contracted alluded to in items 1 through 4 are one
14:09:11 22 contract, but the contract at issue in the case, which was
14:09:15 23 appended to the complaint is yet a completely different
14:09:20 24 contract.

14:09:20 25 It just struck me when I wrote the decision that they

14:09:23 1 were -- they were essentially the same. And it's probably true
14:09:29 2 that it is -- it is true of course that the appended contract
14:09:32 3 does specifically reference the Facebook ownership interest, if
14:09:36 4 you will, but other than that, the thrust of both the documents
14:09:43 5 refers to the creation of this StreetFax software product, which
14:09:50 6 is really the whole avenue, if you will, of all of the other
14:09:57 7 documents as you proffered as being confidential, which I upheld
14:10:01 8 your argument on, didn't I?

14:10:03 9 **MR. LAKE:** Your Honor, I'd be happy to address that,
14:10:06 10 but before I do, if I may request that I think we are currently
14:10:09 11 under a protective order. We're about to be talking about some
14:10:14 12 very sensitive information that I think is protected.

14:10:17 13 **THE COURT:** Well, I'm not asking you to quote from it.

14:10:17 14 **MR. LAKE:** Right.

14:10:19 15 **THE COURT:** But you're telling me --

14:10:19 16 **MR. LAKE:** No. No, I'm not, except I have a feeling
14:10:22 17 that we have an entire press corps behind me and if we are going
14:10:27 18 to be talking about protected documents, until and if and when
14:10:30 19 the protected order is lifted, I think it would be appropriate
14:10:33 20 that we excuse anyone who is associated with the press or a
14:10:38 21 nonparty to this matter so that we can have a open discussion.

14:10:42 22 And if the Judge, you know, Your Honor rules that
14:10:46 23 there is no reason for our discussion to be protected, then they
14:10:51 24 can review the transcript, but I am uncomfortable --

14:10:54 25 **THE COURT:** Can't you just make your general

14:10:56 1 observations about why both should be considered confidential
14:11:00 2 without quoting from them?

14:11:01 3 **MR. LAKE:** The work-for-hire contract was attached to
14:11:06 4 the complaint. That has not been designated as confidential.
14:11:10 5 It's been produced. The other documents that were produced, as
14:11:14 6 a result of the Court's July 1st, 2011 expedited discovery
14:11:26 7 order, have been designated confidential as a result of the
14:11:26 8 protective order that was requested and drafted by the
14:11:27 9 Defendants.

14:11:27 10 They drafted it and such a way that there was broad
14:11:31 11 language. It was an all-encompassing protective order. I think
14:11:36 12 the reason for that is because, at this point in the litigation,
14:11:39 13 we have produced all of the information that has been requested
14:11:42 14 of us and they now want to be able to use that for a couple
14:11:46 15 reasons. One --

14:11:47 16 **THE COURT:** Look, the question is whether or not the
14:11:49 17 documents referred to as 1 through 4 carry with them a
14:11:53 18 reasonable expectation of confidentiality at the time of the
14:11:58 19 designation.

14:11:58 20 **MR. LAKE:** Yes, I think two of them --

14:12:00 21 **THE COURT:** Both documents substantially refer -- if
14:12:05 22 you count out the number of lines, substantially refer to the
14:12:10 23 StreetFax project. Isn't that a fair statement?

14:12:14 24 **MR. LAKE:** There's actually four documents. Two of
14:12:17 25 them --

14:12:17 1 **THE COURT:** Two of them are emails to some lawyer.

14:12:20 2 **MR. LAKE:** Correct. We designated those as attorney
14:12:23 3 client privilege. That was your order --

14:12:25 4 **THE COURT:** Well, you haven't -- I gave you until this
14:12:28 5 morning to produce. I stayed as to the confidentially issue,
14:12:33 6 production issue, but your request said nothing about the
14:12:38 7 attorney client privilege so I'm assuming that you agree they
14:12:42 8 are not privileged.

14:12:43 9 **MR. LAKE:** No, they are privileged.

14:12:45 10 **THE COURT:** Did you take an appeal to Judge Arcara?

14:12:49 11 **MR. LAKE:** No.

14:12:50 12 **THE COURT:** Are you going to ask for a writ of
14:12:54 13 mandamus from the second circuit?

14:12:56 14 **MR. LAKE:** No, Your Honor. I was unable to procure a
14:12:59 15 declaration from the lawyer that they were sent to in time for
14:13:02 16 this hearing because I don't think I could give you a hearsay
14:13:05 17 declaration saying that that attorney --

14:13:07 18 **THE COURT:** You had the burden.

14:13:09 19 **MR. LAKE:** No, I understand that.

14:13:09 20 **THE COURT:** You were the one that nominated them as
14:13:11 21 attorney client privilege. It's Hornbook --

14:13:14 22 **MR. LAKE:** No, I understand.

14:13:15 23 **THE COURT:** -- textbook law that you carry the burden
14:13:17 24 and there was very little offered to me in connection with the
14:13:23 25 -- in opposition for the de-designation motion by the

14:13:28 1 Defendants. I did the best I could. I gave you the benefit of
14:13:31 2 the doubt as to the confidentially order on all four items.

14:13:36 3 **MR. LAKE:** Yeah.

14:13:37 4 **THE COURT:** We're here to hear how it was that I
14:13:41 5 mistook some facts in some material way that affects the
14:13:44 6 analysis of whether Mr. Ceglia at the time of the designation
14:13:48 7 carried a reasonable expectation of confidentially.

14:13:51 8 **MR. LAKE:** Right, and what I'm --

14:13:52 9 **THE COURT:** And I have not seen anything from the
14:13:57 10 Plaintiff that suggests that there is any substantial
14:14:00 11 disagreement with my analysis, that none of the four are
14:14:05 12 protected by the attorney client privilege.

14:14:08 13 **MR. LAKE:** Right, I was going to address all four --

14:14:11 14 **THE COURT:** Isn't that fair? If you're sitting in my
14:14:13 15 chair, is that not a fair perception?

14:14:15 16 **MR. LAKE:** I think it's a fair perception. I think
14:14:18 17 that in order for me to meet my burden at the time of
14:14:22 18 admissibility, should this case proceed to trial, that I would
14:14:24 19 have to give you more information in regards to the two emails.
14:14:27 20 I agree with that.

14:14:28 21 **THE COURT:** Wait a minute. Wait a minute. As to
14:14:30 22 admissibility, I'm not sure what you mean.

14:14:32 23 **MR. LAKE:** Right. We've produced them pursuant to
14:14:34 24 your order.

14:14:34 25 **THE COURT:** You produced --

14:14:36 1 **MR. LAKE:** They've read them.

14:14:37 2 **THE COURT:** You produced all of them?

14:14:39 3 **MR. LAKE:** Yes, we produced them to the Defendants.

14:14:42 4 **THE COURT:** I thought you had not produced the first
14:14:46 5 four because you were concerned with attorney client privilege.

14:14:47 6 **MR. LAKE:** We produced items 2 and 4. We designated
14:14:50 7 them as confidential. We did not produce items 1 and 3, which
14:14:53 8 were the emails. But in light of your order of last Friday, we
14:14:55 9 did produce them. They have them.

14:14:58 10 **THE COURT:** Well, if I made a mistake, you destroyed
14:15:02 11 the privilege by your production.

14:15:04 12 **MR. LAKE:** Well, the issue now is confidentiality.

14:15:07 13 **THE COURT:** You did not ask for a stay for review from
14:15:11 14 me or from Judge Arcara. There is no, as you say, pending
14:15:17 15 request for mandamus review by the second circuit, which I'm
14:15:22 16 sure they would have given you a stay if you asked for one.

14:15:25 17 **MR. LAKE:** We didn't do that.

14:15:26 18 **THE COURT:** I think none of those items are
14:15:28 19 privileged.

14:15:29 20 **MR. LAKE:** But we've produced them.

14:15:31 21 **THE COURT:** Okay.

14:15:32 22 **MR. LAKE:** What I'm concerned with is confidentially.

14:15:35 23 **THE COURT:** And the question is whether there was a
14:15:37 24 reasonable expectation at the time they were designated as being
14:15:40 25 confidential.

14:15:41 1 My problem is I see a document that's signed by one of
14:15:45 2 the two parties to the contract and I can't understand how one
14:15:50 3 party can now assert that it's confidential if the other party
14:15:56 4 has received a copy by virtue of being a party to it.

14:15:59 5 **MR. LAKE:** No, if we take the emails and separate
14:16:02 6 them, that's items 1 and 3, and we talk about the other two
14:16:06 7 documents, 2 and 4, number 4 is that -- that document is a TIFF
14:16:14 8 image, which essentially is a photograph of a page that was
14:16:21 9 attached to the original complaint --

14:16:25 10 **THE COURT:** As allegedly signed by Mr. Zuckerberg?

14:16:28 11 **MR. LAKE:** That's right. That's page two.

14:16:30 12 **THE COURT:** How can your client have a reasonable
14:16:33 13 expectation of confidentiality?

14:16:35 14 **MR. LAKE:** Page one of that --

14:16:36 15 **THE COURT:** This is item 4?

14:16:47 16 **MR. LAKE:** Yeah, item 4. Item 4, the reason that that
14:16:47 17 was designated as privileged is if it was considered in
14:16:47 18 conjunction with item number 2, that was our fear because item
14:16:49 19 number 2 is not identical --

14:16:52 20 **THE COURT:** If you use the word privilege, you're
14:16:56 21 confusing me because we've just established the privilege has
14:16:59 22 been lost. In my opinion, there was no privilege. You failed
14:17:03 23 to show that any of these pieces of paper were submitted in
14:17:03 24 connection with a request for confidential legal advise or
14:17:08 25 services by Mr. Cole or any other lawyer.

14:17:10 1 **MR. LAKE:** Right. I think I'm not articulating my
14:17:14 2 position clearly. I'm not worried about the production. That's
14:17:18 3 been produced. I'm worried about the protective order.

14:17:25 4 **THE COURT:** I know, but when you use the word
14:17:26 5 privilege, you are, to me, combining apples and oranges.

14:17:30 6 **MR. LAKE:** Okay. What I'm trying to say is that item
14:17:31 7 number 2, which is designated at scan TIFF 001 --

14:17:37 8 **THE COURT:** Yes.

14:17:38 9 **MR. LAKE:** -- was never attached to the original
14:17:40 10 complaint. It was different. It's a different document.

14:17:41 11 **THE COURT:** And I'll see that.

14:17:42 12 **MR. LAKE:** And --

14:17:43 13 **THE COURT:** I acknowledge that.

14:17:45 14 **MR. LAKE:** Right.

14:17:46 15 **THE COURT:** My drafting might not have been as precise
14:17:50 16 as it could have been in that regard, but my thought was that
14:17:53 17 the substance, the printed text, is substantially the same as
14:18:01 18 the contract that was attached to the complaint. Is that not a
14:18:06 19 fair characterization?

14:18:08 20 **MR. LAKE:** Portions of it are, but portions of it are
14:18:11 21 erratically different. In fact --

14:18:13 22 **THE COURT:** As to the Facebook issue?

14:18:15 23 **MR. LAKE:** Correct. The document that you're
14:18:17 24 referring to, there has been no foundation laid.

14:18:21 25 In fact, there was a declaration submitted by Mark

14:18:25 1 Zuckerberg himself to the contrary as to item 4, which is page
14:18:27 2 two. He's already told this Court that he never signed the
14:18:31 3 document that was attached to the complaint. We have a
14:18:33 4 declaration in the file that says that.

14:18:35 5 The second page that you're looking at, which is
14:18:37 6 designated as scan TIFF 002, is exactly that page. Mark
14:18:42 7 Zuckerberg denies signing it.

14:18:43 8 Now, as of over the last couple days, in my view of
14:18:48 9 violation of the protective order, the Defendants are claiming
14:18:51 10 that they have found a smoking gun. And the smoking gun that
14:18:54 11 they have provided to the press was item 2 and item 4 and they
14:18:59 12 are claiming that they are somehow connected, that they were
14:19:04 13 somehow drafted by Mr. --

14:19:09 14 **THE COURT:** But you said you did not provide -- you
14:19:11 15 provided 2 and 4 to them.

14:19:13 16 **MR. LAKE:** That's correct.

14:19:14 17 **THE COURT:** But there is something still on the
14:19:17 18 confidentially?

14:19:17 19 **MR. LAKE:** Correct.

14:19:18 20 **THE COURT:** So how did they provide them to the --

14:19:22 21 **MR. LAKE:** They attached them -- well, first of all,
14:19:23 22 they took press interviews. Second, and I have copies of
14:19:25 23 articles written, they filed a motion with unredacted statements
14:19:28 24 saying that they found --

14:19:29 25 **THE COURT:** Which they corrected.

14:19:31 1 **MR. LAKE:** Yes.

14:19:32 2 **THE COURT:** And apparently that did not leak out to
14:19:34 3 the general public.

14:19:36 4 **MR. LAKE:** No, they did. They did. It's been
14:19:39 5 published in numerous articles talking about the smoking gun
14:19:39 6 authentic contract.

14:19:43 7 Then on Monday --

14:19:44 8 **THE COURT:** That is not something the Court has any --
14:19:46 9 that was apparently a clerical or a procedural error on the part
14:19:51 10 of the Defendants. I'm well-aware of their efforts to correct
14:19:51 11 it.

14:19:52 12 What I'm not aware of is what you just said, that
14:19:55 13 there was actually any sharing of that from the clerk's office
14:19:58 14 as a result of that mistaken file.

14:20:01 15 **MR. LAKE:** They also attached it saying that --

14:20:02 16 **THE COURT:** You're saying there was? So somehow
14:20:06 17 somebody got into our ECF system despite the efforts of our --

14:20:14 18 **THE CLERK:** [Inaudible.]

14:20:14 19 **THE COURT:** But that actually happened?

14:20:18 20 **THE CLERK:** Yes.

14:20:19 21 **THE COURT:** I was not aware of that.

14:20:21 22 **MR. LAKE:** I can read you a quote. There are numerous
14:20:27 23 articles written that quote the redacted portions.

14:20:27 24 **THE COURT:** Mr. Lake, I only dealt with the motion
14:20:29 25 that was in front of me, which was the de-designation motion.

14:20:33 1 This problem with the clerk's office was totally unforeseen.
14:20:37 2 And if in fact the mistake was made, it appears to have been a
14:20:42 3 good-faith error on the part of the Defendants.

14:20:46 4 **MR. LAKE:** Except for that when we received the
14:20:48 5 Court's order on Friday, and in the order it referenced, and I
14:20:52 6 highlighted this from the letter that I sent you Monday, that
14:20:56 7 because the Court's opinion was that item 2 and item 4 were what
14:21:01 8 were already attached to the complaint, that therefore, there
14:21:04 9 was no protection that should be required.

14:21:06 10 We wrote -- immediately wrote a letter to
14:21:09 11 Mr. Southwell that said Mr. Southwell, it's clear that the
14:21:14 12 Judge's order is erroneous because item 2 is not the same as the
14:21:19 13 first page of the contract that was attached to the complaint.

14:21:23 14 We are planning on addressing the Court on Monday
14:21:25 15 morning. Please abstain from publishing or making public under
14:21:30 16 the protective order item number 2, which is scan TIFF number 1,
14:21:36 17 until we have the opportunity to address the Court.

14:21:39 18 We did that on Monday. Monday night they filed a
14:21:41 19 pleading that had item number 2, the scan TIFF version, attached
14:21:45 20 to it. It's been picked up by the press and published.

14:21:51 21 **THE COURT:** Wait, what?

14:21:52 22 **MR. LAKE:** That was on Monday.

14:21:54 23 **THE COURT:** Doc number 110, is that what you're
14:21:58 24 referring to?

14:21:59 25 **MR. LAKE:** Yeah. And then on Tuesday, the Court

14:22:12 1 issued the new --

14:22:12 2 **THE COURT:** I put a stay on the order.

14:22:12 3 **MR. LAKE:** Right, but what happened between Friday in
14:22:12 4 receiving the order, recognizing that those pages were
14:22:13 5 different, notifying the Defendants of the error, notifying the
14:22:17 6 Court on Monday, between that time period, they went out and
14:22:21 7 published that actual document, which I think not only was it a
14:22:25 8 violation by the protective order to allude to it, but calling
14:22:27 9 it a smoking gun, calling it an authentic contract, then filing
14:22:30 10 an unredacted opposition where they refer to it again, then
14:22:36 11 getting a letter that clearly points out where we were, then
14:22:40 12 publishing the actual document itself and then the next day the
14:22:43 13 Court plans to stay on the order I don't think is a good-faith
14:22:46 14 understanding.

14:22:47 15 **THE COURT:** Mr. Lake, are you referring -- when you
14:22:50 16 said they filed a repleading revealing the --

14:22:54 17 **MR. LAKE:** Yeah, in reply, as their attachment to the
14:22:58 18 reply.

14:22:59 19 **THE COURT:** Well, that's what I'm looking for. You
14:23:04 20 say that would be in the brief?

14:23:04 21 **THE CLERK:** 111.

14:23:06 22 **THE COURT:** I'm trying to locate where exactly there
14:23:09 23 was a divulgation, if you will, of the document in anything that
14:23:14 24 was filed.

14:23:15 25 **THE CLERK:** Document 111.

14:23:17 1 **MR. SNYDER:** Your Honor, it's Exhibit A to the
14:23:20 2 Southwell declaration 111-1.

14:23:31 3 **THE COURT:** That's Mr. Southwell's declaration?

14:23:34 4 **MR. SNYDER:** Yes, Your Honor.

14:23:35 5 **THE COURT:** Exhibit A?

14:23:36 6 **MR. SNYDER:** Yes, Your Honor.

14:23:40 7 **THE CLERK:** Document 111.

14:23:47 8 **THE COURT:** Just give us a moment. We'll find it.

14:23:54 9 **MR. SNYDER:** May I approach, Your Honor?

14:23:55 10 **THE COURT:** Yes, it could possibly -- just to
14:24:10 11 expedite. Now, I understand your point. Go ahead.

14:24:18 12 **MR. LAKE:** Well, the point is it was not an accident,
14:24:21 13 that that was published on that day and it was not in a
14:24:26 14 good-faith error because they didn't understand the order that
14:24:30 15 was issued on Friday because we pointed it out to them. We also
14:24:34 16 told them we would be addressing it with you Monday, which is
14:24:37 17 what we did.

14:24:38 18 And they took that opportunity, before you had an
14:24:41 19 opportunity to revise your order, to publish that to the press
14:24:44 20 in violation of what I believe is the protective order. And I
14:24:48 21 think that that is extremely prejudicial because not only was it
14:24:52 22 done purposely, it was done for two reasons, I think.

14:24:55 23 Number one, and it's what we've seen through this
14:24:58 24 entire case, and that is the continued rhetoric that somehow
14:25:04 25 Mr. Ceglia is a liar and a fraud and a forger and now that I --

14:25:08 1 somehow my integrity is at issue.

14:25:12 2 I've read 40 pages of essentially the same thing,
14:25:18 3 calling us liars. They cited four cases. None of them are on
14:25:22 4 point. None of this is before the Court. We have not had an
14:25:25 5 opportunity to conduct our discovery. We have not made any such
14:25:31 6 excursions, but when there is a protective order in place, not
14:25:34 7 only -- and we haven't gotten to the actual discovery order.

14:25:34 8 We haven't seen any emails yet, and we'll discuss this
14:25:38 9 later, but in violation of the protective order, they're doing
14:25:42 10 it for two reasons. One, they want to poison the jury pool. No
14:25:48 11 doubt about it. They want everybody to think that Paul Ceglia
14:25:51 12 somehow doesn't have a deal with Mark Zuckerberg.

14:25:53 13 Second thing they want to do is they want to try this
14:25:56 14 case in the press. They want the press to see everything that
14:25:59 15 they write, whether it's founded, whether it's based on fact,
14:26:03 16 whether it's supported by declarations of the party or not.

14:26:05 17 They can exercise their litigation privilege all day
14:26:10 18 long. They do it every chance they get. They do it by
14:26:12 19 conducting press interviews. They do it by filing papers and
14:26:15 20 they do it by alluding to things if they don't think it is under
14:26:21 21 protective order.

14:26:21 22 Then in this case, they went a step further and
14:26:24 23 actually produced the documents, which they now claim is a
14:26:25 24 smoking gun and some authentic contract which there is no basis
14:26:29 25 for that, there is no foundation.

14:26:30 1 Mark Zuckerberg himself has never said -- although now
14:26:35 2 I hear they're changing their position and they're saying yes,
14:26:39 3 the second page is authentic. Mark Zuckerberg did sign this
14:26:43 4 second page. That's what I'm reading in the press. That's what
14:26:46 5 it sounds like their argument now is.

14:26:49 6 So if that's the case, what is with this declaration
14:26:52 7 saying I never signed it? That's why the protective order is so
14:26:56 8 important. And it was drafted broadly by them for this very
14:27:00 9 purpose. That's why we designated all of this as confidential.

14:27:03 10 We're either going to have this case heard, and we're
14:27:06 11 going to have it heard on the merits the way it should be or
14:27:09 12 this case is going to be in the press, which I think is
14:27:12 13 extremely prejudicial to our client and that's why I'm upset
14:27:16 14 with what happened with this particular document.

14:27:19 15 **THE COURT:** I understand. Anything else?

14:27:23 16 **MR. LAKE:** Well, you asked --

14:27:25 17 **THE COURT:** I asked at the beginning how Mr. Ceglia
14:27:29 18 could expect a contract between himself and Mr. Zuckerberg to be
14:27:34 19 a confidential item vis-a-vis the general public at the time he
14:27:46 20 designated it as such.

14:27:46 21 **MR. LAKE:** And the answer to that is the contract
14:27:48 22 between Ceglia and Zuckerberg has been made public when it was
14:27:51 23 attached to the Complaint. The document you're looking at is
14:27:53 24 not the contract that was entered into between Zuckerberg and
14:27:56 25 Ceglia.

14:27:57 1 **THE COURT:** How then would Mr. Zuckerberg's purported
14:28:03 2 signature get on it?

14:28:05 3 **MR. LAKE:** It's two different pages. They're not even
14:28:08 4 the same. Those are TIFF images. There's no native format
14:28:09 5 behind that. We don't know when that was drafted. We don't
14:28:11 6 know by who. We don't even if it was made by Mr. Zuckerberg and
14:28:17 7 planted on Mr. Ceglia's computers.

14:28:20 8 **THE COURT:** I thought the document came from you.
14:28:22 9 That's why you wanted to designate it as confidential.

14:28:23 10 **MR. LAKE:** Right. There's been no showing of who
14:28:25 11 wrote it, when or how it got there, which is exactly why the
14:28:28 12 next phase of this proceeding needs to be expedited discovery.

14:28:33 13 **THE COURT:** How would you have a expectation of a
14:28:35 14 piece of paper being confidential when it came from you with --
14:28:39 15 I mean, these signatures or what purport to be signatures on it
14:28:43 16 from the Court's perspective, if you put yourself in my
14:28:48 17 position, being submitted to me on a claim that it's
14:28:51 18 confidential?

14:28:52 19 **MR. LAKE:** You're looking at two different documents.

14:28:54 20 **THE COURT:** Ho can it be considered to be
14:28:56 21 confidential?

14:28:56 22 **MR. LAKE:** Right. Scan TIFF 2, my understanding is
14:28:59 23 the same as the second page of the work-for-hire contract that
14:29:02 24 was attached to the complaint.

14:29:04 25 If the Court looks at that independently, I agree with

14:29:09 1 you that that is not a confidential document. If you are you
14:29:12 2 looking at it in conjunction with scan TIFF 1 and you believe
14:29:17 3 the Defendants claim that that is the smoking gun authentic
14:29:21 4 contract, although they have no proof of it --

14:29:25 5 **THE COURT:** Scan TIFF 1?

14:29:26 6 **MR. LAKE:** That's page one.

14:29:28 7 **THE COURT:** Item 1 in the log?

14:29:31 8 **MR. LAKE:** That's item 2.

14:29:34 9 **THE CLERK:** Right.

14:29:35 10 **MR. LAKE:** Item 1 is the emails we just already
14:29:37 11 discussed.

14:29:38 12 **THE COURT:** Coming back to item 2 --

14:29:40 13 **MR. LAKE:** Right.

14:29:43 14 **THE COURT:** -- what is your argument?

14:29:46 15 **MR. LAKE:** Right. The argument is that --

14:29:46 16 **THE COURT:** Why should I not -- in the way that it was
14:29:50 17 submitted to the Court, why wouldn't I deduce that the two
14:29:53 18 pieces of paper go together?

14:29:55 19 **MR. LAKE:** Because page two goes with the
14:29:59 20 work-for-hire contract that was attached to the complaint. And
14:30:01 21 the reason we know that is because --

14:30:05 22 **MR. SNYDER:** Your Honor, perhaps I can clarify.

14:30:07 23 **THE COURT:** Just a second. The log -- who prepared
14:30:30 24 the log?

14:30:30 25 **MR. LAKE:** The Defendants' experts.

14:30:34 1 **THE COURT:** Well, didn't you have something to do with
14:30:36 2 it?

14:30:37 3 **MR. LAKE:** No, Your Honor. If you recall, the way the
14:30:39 4 order was described that they, Stroz Friedberg, who was their
14:30:45 5 experts --

14:30:45 6 **THE COURT:** Yes.

14:30:46 7 **MR. LAKE:** -- were to do a relevant search and when
14:30:50 8 they did, they were to produce a log of what they considered to
14:30:52 9 be presumed relevant documents.

14:30:54 10 **THE COURT:** Right.

14:30:54 11 **MR. LAKE:** And we were only allowed to do two things.
14:30:56 12 We were allowed to look at that designated things as either
14:31:00 13 privileged and/or confidential --

14:31:01 14 **MR. SNYDER:** That's not accurate.

14:31:03 15 **THE COURT:** Before this log was submitted to the
14:31:05 16 Court, you had a chance to examine it?

14:31:07 17 **MR. LAKE:** Right.

14:31:07 18 **THE COURT:** So if you're the Court, wouldn't you
14:31:10 19 fairly conclude that this document, the log, was something that
14:31:15 20 both parties represented to the Court as a accurate reflection
14:31:22 21 of the Plaintiff's assertion of both attorney client privilege
14:31:26 22 and confidentiality per the confidentially agreement?

14:31:31 23 **MR. LAKE:** Right, and we designated two --

14:31:33 24 **THE COURT:** Just one second.

14:31:33 25 **MR. LAKE:** Okay.

14:31:34 1 **THE COURT:** So far so good. So when I'm reading, as
14:31:37 2 I'd now would like to draw your attention to the verbiage
14:31:42 3 associated with item 2, it says page one of signed and dated
14:31:49 4 StreetFax.

14:31:50 5 If I'm going to say anything that in your view is
14:31:53 6 going to compromise the potential argument that it remains
14:31:58 7 confidential, then just say so. Just say so. I'll stop and say
14:32:03 8 you read it with me silently.

14:32:06 9 **MR. LAKE:** No, I have it here. I know what it says.

14:32:08 10 **THE COURT:** And then you move your eye down to item 4,
14:32:12 11 if you're the Court, would it not be a fair inference to believe
14:32:19 12 that the two pages were intended and are in fact physically
14:32:24 13 joined into a single contract?

14:32:26 14 **MR. LAKE:** If you look down to item 12 --

14:32:29 15 **THE COURT:** Am I missing something here?

14:32:31 16 **MR. LAKE:** Yeah, you are.

14:32:32 17 **THE COURT:** What is it?

14:32:33 18 **MR. LAKE:** If you look at item 12, it says what
14:32:38 19 appears to be, because when they wrote this. They did that.

14:32:38 20 **THE COURT:** How is the Court expected to go through
14:32:41 21 these manipulations when there's a request to enforce the
14:32:45 22 confidentially order and all I'm given is this and nothing else?

14:32:53 23 **MR. LAKE:** No.

14:32:53 24 **THE COURT:** I mean, may I be excused for not following
14:32:53 25 your train of thinking here, Mr. Lake?

14:32:53 1 **MR. LAKE:** No, Your Honor.

14:32:55 2 **THE COURT:** I may not be excused?

14:32:55 3 **MR. LAKE:** You may be excused from whatever you like.

14:32:59 4 My point is this --

14:32:59 5 **THE COURT:** That's right. But is it a fair inference
14:33:02 6 for the Court to believe that items -- items 2 and 4 are part
14:33:06 7 and parcel of the same contract based on what you both presented
14:33:11 8 to me?

14:33:12 9 **MR. LAKE:** Right. And that's why --

14:33:13 10 **THE COURT:** Is that not fair?

14:33:14 11 **MR. LAKE:** That's why we ask for oral argument so we
14:33:17 12 can make any clarifications.

14:33:18 13 **THE COURT:** But we are trying to go back in time to
14:33:18 14 explain to you how I arrived --

14:33:18 15 **MR. LAKE:** No, I understand.

14:33:22 16 **THE COURT:** -- at the conclusion I arrived at.

14:33:23 17 **MR. LAKE:** And I also know the cat's out of the bag
14:33:26 18 because it's already been produced.

14:33:37 19 **THE COURT:** Well, that part I was not aware that it
14:33:37 20 was out of the bag insofar as you already explained it to me.
14:33:37 21 And truthfully, when I saw Mr. Southwell's filing, I guess I
14:33:38 22 didn't realize that it was unredacted and that he was then --
14:33:44 23 and that that filing occurred --

14:33:47 24 **MR. LAKE:** Monday.

14:33:48 25 **THE COURT:** -- before your letter came to me, is that

14:33:50 1 what you're saying?

14:33:51 2 **MR. LAKE:** I wrote a letter to him on Friday asking
14:33:53 3 him to be professional and to acknowledge that there could be an
14:33:56 4 error in the order and not to publish item 2.

14:34:00 5 **THE COURT:** So when he alludes to it and attaches
14:34:03 6 Exhibit A to document 111, he is flouting your requests?

14:34:09 7 **MR. LAKE:** Yeah, he is expressly ignoring it.

14:34:12 8 **THE COURT:** Yes or no?

14:34:12 9 **MR. LAKE:** Yes.

14:34:12 10 **THE COURT:** So he then gets your letter. He doesn't
14:34:15 11 attempt to withdraw it. He doesn't attempt to redact it as he
14:34:21 12 had done on an earlier occasion and that's the basis for your
14:34:23 13 assertion, that they acted in a way that is deserving, I'm
14:34:27 14 assuming you're going to suggest, of sanctions of some form or
14:34:33 15 another.

14:34:33 16 And I was not aware that the cat was out of the bag in
14:34:37 17 the sense that the media had actually quoted verbatim or had
14:34:41 18 actually examined Exhibit A --

14:34:43 19 **MR. LAKE:** And published it.

14:34:44 20 **THE COURT:** And published it. I was not aware of
14:34:47 21 that.

14:34:48 22 **MR. LAKE:** Hundreds of times.

14:34:49 23 **THE COURT:** So can we come back to the question of
14:34:52 24 whether, if we examine each line of items 2 and 4, whether
14:34:57 25 joined or unjoined with the document that's attached to the

14:35:01 1 complaint, would you give -- attempt to give me a ball park
14:35:04 2 estimate of your own as to what percentage of all of the
14:35:09 3 verbiage in two documents are the same and what percentages are
14:35:12 4 materially different?

14:35:14 5 **MR. LAKE:** Paragraphs --

14:35:16 6 **THE COURT:** Approximately.

14:35:17 7 **MR. LAKE:** There are two paragraphs that reference
14:35:20 8 Facebook on --

14:35:21 9 **THE COURT:** Out of how many paragraphs?

14:35:22 10 **MR. LAKE:** On the first page there are seven and on
14:35:27 11 the second page it's identical.

14:35:29 12 **THE COURT:** So if you add them together, how many
14:35:32 13 paragraphs of the entirety of the document, both first page and
14:35:37 14 second page --

14:35:37 15 **MR. LAKE:** Well --

14:35:38 16 **THE COURT:** -- refer to Facebook, approximately?

14:35:41 17 **MR. LAKE:** On the work --

14:35:44 18 **THE COURT:** 50 percent?

14:35:45 19 **MR. LAKE:** On the work-for-hire contract --

14:35:47 20 **THE COURT:** 20 percent?

14:35:49 21 **MR. LAKE:** There are 18.

14:35:49 22 **THE COURT:** 10 percent?

14:35:50 23 **MR. LAKE:** There are 18 paragraphs. The second page
14:35:57 24 it's paragraphs eight through 18, those are boilerplate. On
14:36:03 25 page one, paragraphs one through seven, talks about what the

14:36:08 1 terms are to be in regards to the computer programming work and
14:36:13 2 the -- this Facebook purchase. And those are set forth in
14:36:18 3 paragraphs two and three.

14:36:19 4 So the majority of the first page has to do with what
14:36:24 5 the duties and obligations Mark Zuckerberg has for Paul Ceglia.
14:36:29 6 On the second page it's all boilerplate. So I would say that
14:36:33 7 the percentages are large, but it doesn't matter because the two
14:36:37 8 paragraphs that matter are paragraphs two and three. And if
14:36:40 9 you, the Court is inclined --

14:36:43 10 **THE COURT:** And those two paragraphs -- do I get this
14:36:50 11 part of it straight too, those two paragraphs are indeed
14:36:54 12 included in --

14:36:54 13 **MR. LAKE:** Yes, yes.

14:36:54 14 **THE COURT:** So the only material difference between
14:36:57 15 items 2 and 4 as to the confidentially issue are two paragraphs
14:37:04 16 that are already made public by the Plaintiff?

14:37:06 17 **MR. LAKE:** No.

14:37:07 18 **THE COURT:** No?

14:37:08 19 **MR. LAKE:** No. There is --

14:37:10 20 **THE COURT:** What am I -- how can you say -- I thought
14:37:14 21 we just agreed that those are the two paragraphs that make this
14:37:18 22 lawsuit what it is, and they are public.

14:37:20 23 **MR. LAKE:** There is different language. The title is
14:37:23 24 different. The fact that there is no metadata on the second
14:37:29 25 scan TIFF 2, because it's a TIFF file as opposed to a word file,

14:37:33 1 and we'll get to that later.

14:37:35 2 I'm sure Mr. Snyder is going to point out that the
14:37:39 3 final version made, a soft copy of the work-for-hire contract,
14:37:42 4 was not produced. I submitted a certification saying it's
14:37:45 5 because it could not be located. I'm sure it will --

14:37:47 6 **THE COURT:** Again, I'm trying to help you, I believe,
14:37:50 7 Mr. Lake, by keeping you on track. The question is: Now that
14:37:55 8 we've got some sense of what portion of the verbiage in the
14:38:02 9 contract attached to the complaint and the contract, if you
14:38:04 10 will, that we're discussing are different, what I'm trying to
14:38:10 11 understand now is if you excise out the two paragraphs allegedly
14:38:19 12 pertaining to Facebook out of items 2 and 4, on what basis does
14:38:25 13 the Plaintiff retain a reasonable belief in the confidentiality
14:38:29 14 of the remaining paragraphs?

14:38:31 15 **MR. LAKE:** Okay. Just --

14:38:32 16 **THE COURT:** Is that a fair question?

14:38:34 17 **MR. LAKE:** Of course it's a fair question. I'll
14:38:35 18 try --

14:38:35 19 **THE COURT:** Thank you.

14:38:36 20 **MR. LAKE:** I'll try to give you the best answer I can.

14:38:39 21 **THE COURT:** Thank you.

14:38:39 22 **MR. LAKE:** First, the two paragraphs that talk about
14:38:42 23 the terms of Facebook are the two paragraphs -- you're right.
14:38:45 24 In paragraph five it references Facebook. In other paragraphs
14:38:49 25 the language is different.

14:38:50 1 We've done an analysis word by word of these two
14:38:54 2 contracts side by side. I didn't bring that with me. I didn't
14:38:59 3 think I would be going into this level of minutia. I apologize.
14:39:03 4 I can have it sent over immediately.

14:39:03 5 **THE COURT:** Well, you're the one who raised it.

14:39:03 6 **MR. LAKE:** The title is different. And if where
14:39:03 7 you're going is that we should redact anything that's different
14:39:07 8 between the two --

14:39:07 9 **THE COURT:** No, no. I'm simply asking myself the
14:39:11 10 question if I'm Mr. Ceglia, on what basis do I have a reasonable
14:39:23 11 belief that these two pieces of paper are documents which the
14:39:26 12 public wouldn't otherwise have access to and are within the four
14:39:31 13 corners of the confidentially requirements of proprietary,
14:39:36 14 business, personal, technical.

14:39:41 15 **MR. LAKE:** Right, or otherwise privileged.

14:39:44 16 **THE COURT:** And otherwise privileged. And we just
14:39:48 17 decreed that on the privilege issue I overruled you and that you
14:39:54 18 acquiesced in the rules.

14:39:54 19 **MR. LAKE:** Correct.

14:39:54 20 **THE COURT:** So don't tell me about privilege.

14:39:54 21 **MR. LAKE:** No, I wasn't -- if I said privilege, I
14:39:56 22 didn't mean it.

14:39:56 23 **THE COURT:** You did.

14:39:56 24 **MR. LAKE:** I meant to say prejudicial. And the reason
14:40:00 25 I --

14:40:00 1 **THE COURT:** You said privileged.

14:40:02 2 **MR. LAKE:** Okay. Well, if I misspoke, I apologize. I
14:40:05 3 meant to say prejudicial, not privileged.

14:40:05 4 **THE COURT:** Prejudicial?

14:40:05 5 **MR. LAKE:** Correct.

14:40:07 6 **THE COURT:** And that is in the confidentially
14:40:09 7 agreement?

14:40:09 8 **MR. LAKE:** There is a catchall provision in there that
14:40:12 9 talks about -- and it's in the papers. But it is a broad
14:40:18 10 provision in the confidentially agreement and --

14:40:24 11 **THE COURT:** Or otherwise reasonably designable as
14:40:27 12 confidential. It's quite circular actually.

14:40:30 13 **MR. LAKE:** Yeah.

14:40:31 14 **THE COURT:** And I didn't draft it.

14:40:33 15 **MR. LAKE:** I know.

14:40:33 16 **THE COURT:** But you people signed up for it.

14:40:37 17 **MR. LAKE:** Right.

14:40:37 18 **THE COURT:** So we're back to confidentially and what
14:40:39 19 I'm trying to understand is that how a document that you
14:40:41 20 provided, and you agreed is confidential with the people who for
14:40:46 21 the defense quote collaborated with you and drafted the
14:40:50 22 confidentiality agreement thought that a document that you
14:40:53 23 submitted to the Court with what purports to be a signature by
14:40:57 24 Mr. Zuckerberg, which is between the Plaintiff and
14:41:00 25 Mr. Zuckerberg -- I'm trying to remember if their names appears

14:41:09 1 on the first page. I can't see because the copy I have is not
14:41:12 2 that good, conceivably could be something that should have
14:41:18 3 been -- or perhaps a confidential nature or otherwise could be
14:41:22 4 retained.

14:41:25 5 If three-quarters of the verbiage is the same as the
14:41:30 6 document that's in the complaint, as you say, I perhaps could
14:41:34 7 have used a slightly different phraseology in what I wrote. But
14:41:40 8 the core concept is that we're looking at something that already
14:41:44 9 has been made public by the Plaintiff.

14:41:46 10 Moreover, it's a document that the Plaintiff is
14:41:49 11 representing to the Court was signed by Mr. Zuckerberg.
14:41:51 12 Otherwise, you would not have allowed to it to be sent to me in
14:41:55 13 that form. You would have said oh, well, that name Zuckerberg
14:41:58 14 on there, we don't know who put that on there. It came from our
14:42:02 15 files, but how could we possibly be held to warranting that
14:42:06 16 that's Mr. Zuckerberg's signature.

14:42:08 17 If you're looking at it, and if you're looking at it
14:42:10 18 as I am as a neutral, it looks like it's being represented as a
14:42:15 19 document that was signed by your client and Mr. Zuckerberg.
14:42:18 20 Ergo, how could Mr. Ceglia believe that it was a confidential
14:42:23 21 document? Particularly when Mr. Zuckerberg is seriously
14:42:27 22 defending the case as he is.

14:42:28 23 **MR. LAKE:** Right. I would agree with you 100 percent
14:42:31 24 completely as to page two. But as to page one, I disagree. I
14:42:35 25 disagree for the same reasons that the defense disagrees with

14:42:39 1 our interpretation for our work-for-hire contract.

14:42:41 2 **THE COURT:** We just went through about 10 minutes ago
14:42:44 3 a process by which you also agreed that the Court could
14:42:47 4 reasonably construe these submissions as indicating that the two
14:42:50 5 pages are bound together as a single document.

14:42:55 6 **MR. LAKE:** No.

14:42:55 7 **THE COURT:** Why it was portrayed the way it was was
14:42:57 8 never portrayed to the Court.

14:42:57 9 **MR. LAKE:** No.

14:42:57 10 **THE COURT:** I've heard no argument as to this issue.
14:43:02 11 I'm not getting this argument for the first time.

14:43:05 12 **MR. LAKE:** I will --

14:43:06 13 **THE COURT:** Maybe I should have waited until today to
14:43:08 14 go down and rule on all 120 items. I don't think the parties
14:43:13 15 wanted that. At least I got the impression that they were
14:43:18 16 appreciative of the effort that we made to give you a ruling.
14:43:22 17 And now it's the clear both loose phenomena. No good deed goes
14:43:29 18 unpunished, right, Mr. Lake?

14:43:30 19 **MR. LAKE:** That's right. And if I was prepared to
14:43:30 20 spend all day and go through 120, but I do appreciate the
14:43:30 21 Court's efforts.

14:43:42 22 I will respectfully disagree that scan TIFF item 001
14:43:42 23 goes with 002 and I will never concede that.

14:43:45 24 **THE COURT:** But you will agree that the way it was
14:43:48 25 portrayed, that that was a logical conclusion?

14:43:51 1 **MR. LAKE:** Oh, yes. No, your logic makes perfect
14:43:56 2 sense.

14:43:58 3 **MR. SNYDER:** On that point just to complete the record
14:44:04 4 because I think --

14:44:04 5 **THE COURT:** I know you like to use the podium. Would
14:44:04 6 you want to stand and deliver? Step to the podium. If you can
14:44:05 7 get in the habit of being seated, then stay there.

14:44:05 8 **MR. SNYDER:** Just to complete the record, of course
14:44:08 9 your Your Honor has reviewed the emails that the Plaintiff sent
14:44:11 10 in 2004 attaching the StreetFax contract. And in those emails,
14:44:17 11 which Your Honor has ruled properly and correctly --

14:44:29 12 **THE COURT:** 1 and 3?

14:44:31 13 **MR. SNYDER:** Yes, Your Honor. As your Your Honor
14:44:37 14 perceived, the Plaintiff, in 2004, states and admits indeed what
14:44:40 15 Mr. Lake was trying to --

14:44:41 16 **THE COURT:** I thought I overlooked that.

14:44:42 17 **MR. SNYDER:** Page one and two.

14:44:44 18 **THE COURT:** I left you something to talk about.

14:44:46 19 **MR. SNYDER:** Yes, thank you. In fact, the Plaintiff
14:44:48 20 in 2004, which was --

14:44:53 21 **THE COURT:** I understand your point. Both of them
14:44:56 22 purport to say RE StreetFax contracts and the first one, page
14:45:02 23 one of two for that and the second document is two of two were
14:45:06 24 --

14:45:06 25 **MR. SNYDER:** Right.

14:45:07 1 **THE COURT:** -- for the same thing. So what else was I
14:45:10 2 supposed to conclude?

14:45:11 3 **MR. SNYDER:** The contemporaneous emission by the
14:45:15 4 Plaintiff in email stated in 2004 --

14:45:15 5 **THE COURT:** Anything else on that?

14:45:16 6 **MR. SNYDER:** No, Your Honor.

14:45:17 7 **THE COURT:** What do you want me to do about the item
14:45:19 8 29 that arguably should have been ruled as not confidential? Do
14:45:25 9 you want to push that?

14:45:36 10 **MR. SNYDER:** I don't think there'd be any opposition
14:45:36 11 since the text of that purported email, which went --

14:45:36 12 **THE COURT:** Well, I mean they're in the public domain.

14:45:36 13 **MR. LAKE:** That's fine. There are other designations.
14:45:36 14 I'm not --

14:45:36 15 **THE COURT:** I don't know why they even went over.
14:45:39 16 Probably why I gave it the benefit of the doubt, thinking it's
14:45:43 17 new material and couldn't possibly be confidentiality as to the
14:45:47 18 emails that were attached to the complaint --

14:45:48 19 **MR. LAKE:** Your Honor, those were --

14:45:49 20 **MR. SNYDER:** They --

14:45:50 21 **THE COURT:** Low and behold, certainly that's what I --
14:45:51 22 I made that error too.

14:45:53 23 **MR. SNYDER:** Given the time constraints, there were
14:45:56 24 other designations that we wanted to address, we don't even need
14:46:04 25 to do it today, but just so Your Honor is aware, 40 through 45,

14:46:10 1 which Your Honor upheld as confidential actually contain among
14:46:15 2 the most damning evidence uncovered on the --

14:46:19 3 **THE COURT:** It's not a matter of whether it's damning.
14:46:22 4 It's a matter of whether it should be treated as confidential or
14:46:25 5 not.

14:46:25 6 **MR. SNYDER:** Well, it's certainly not confidential
14:46:28 7 because it's information that reflects the utilization without
14:46:35 8 disposing its contents in court. The utilization of various
14:46:38 9 computer --

14:46:39 10 **THE COURT:** Would you say that this is -- I mean, now,
14:46:43 11 I'm not a computer engineer and as you can see from my decision,
14:46:47 12 I have to rely on the absence of any help from the parties --

14:46:50 13 **MR. SNYDER:** Yes, Your Honor.

14:46:51 14 **THE COURT:** -- on getting a glossary of some of the
14:46:54 15 numerous high-tech terms that were used by your computer mavins
14:46:59 16 from our able information management staff and I have a
14:47:03 17 representative here in case I need more help.

14:47:06 18 In looking at it from a non-technical point of view
14:47:12 19 and the absence of technical assistance from either the defense
14:47:16 20 or the Plaintiff, would you think the that layman would look at
14:47:20 21 this material and say this is technical information or
14:47:24 22 non-technical information?

14:47:25 23 **MR. SNYDER:** I think Your Honor was correct under the
14:47:28 24 circumstances to sustain a confidentially designation based on
14:47:33 25 the information available to the Court.

14:47:34 1 We did not --

14:47:36 2 **THE COURT:** Do you seriously think that this is
14:47:39 3 non-technical information?

14:47:40 4 **MR. SNYDER:** It turns out to be not technical
14:47:42 5 information. Although --

14:47:43 6 **THE COURT:** Turns out?

14:47:44 7 **MR. SNYDER:** Yes, on its face I could see how someone
14:47:44 8 without --

14:47:47 9 **THE COURT:** So if you had an idea that it turns out
14:47:49 10 not to be technical, I should have been told about it when you
14:47:53 11 asked for the de-designation, don't you think?

14:47:56 12 **MR. SNYDER:** Well, Your Honor, we did not -- we only
14:47:57 13 challenged the two most important documents and what we could
14:48:00 14 do --

14:48:01 15 **THE COURT:** Look, you're the ones who want expedition.
14:48:04 16 I'm giving it to you and now you're saying well, maybe not so
14:48:07 17 much, Judge. No.

14:48:07 18 **MR. SNYDER:** Your Honor, we can address these other
14:48:10 19 documents at a future date?

14:48:11 20 **THE COURT:** If you want to, you can't -- I'm not going
14:48:14 21 to prohibit you from further motions. But for today's purposes,
14:48:20 22 there is no motion before me to reconsider my ruling as to item
14:48:24 23 29?

14:48:24 24 **MR. SNYDER:** At this point, no, Your Honor.

14:48:25 25 **THE COURT:** Your request for reconsideration is

14:48:28 1 granted. And upon further reconsideration, the Court finds its
14:48:33 2 original ruling was correct. The two documents are interlinked
14:48:36 3 and the substantial portion of the verbiage in both has already
14:48:41 4 been revealed to the public.

14:48:42 5 And the document, as represented to the Court, was a
14:48:45 6 bilateral contract, if so, then Mr. Ceglia, in my humble
14:48:52 7 estimation, could not entertain a reasonable belief in continued
14:48:54 8 confidentiality.

14:48:54 9 **MR. SNYDER:** On 29, Your Honor, my colleagues --

14:48:57 10 **THE COURT:** So therefore, the Court adheres to its
14:49:00 11 original ruling for the reason stated.

14:49:02 12 **MR. SNYDER:** On 29, my colleagues are reminding me
14:49:05 13 that that is an email as to which the Plaintiff put in the
14:49:10 14 complaint, the purported email.

14:49:11 15 There's been no objection so we would respectfully
14:49:15 16 request that since it's before the Court, we discuss that the
14:49:17 17 Court de-designate item 29 just because -- -

14:49:20 18 **THE COURT:** Do you have a problem with that, Mr. Lake?

14:49:22 19 **MR. LAKE:** If it's the email that was attached to the
14:49:26 20 complaint, I would agree with Mr. Snyder that it's been made
14:49:27 21 public by the Plaintiff.

14:49:27 22 **THE COURT:** There's been an awful lot of papers and I
14:49:27 23 have to make the comparison again for the parties. Are you able
14:49:32 24 to provide the Court with that careful analysis?

14:49:34 25 **MR. LAKE:** Right.

14:49:34 1 **THE COURT:** We did the best we could.

14:49:36 2 **MR. LAKE:** No, I understand.

14:49:36 3 **THE COURT:** Upon mutual agreement, the parties will
14:49:42 4 amend their order saying there is a de-designation of item 29.

14:49:46 5 **MR. SNYDER:** Thank you.

14:49:46 6 **THE COURT:** Now, as to the merits of the two motions,
14:49:50 7 I would like to proceed in the order it's presented taking up,
14:49:51 8 first of all, Mr. Lake's motion to compel Mr. Zuckerberg's
14:49:55 9 production, I think, of the, if I could use the term loosely,
14:49:59 10 Harvard emails, at which turns on a interpretation of the
14:50:04 11 Court's order regarding production.

14:50:10 12 And I read the papers and I'm prepared to hear further
14:50:17 13 discussion, not too lengthy please, so we could then turn to the
14:50:21 14 more lengthy issues provided in the cross motion, which I would
14:50:27 15 purpose to go through item by item, hear arguments.

14:50:28 16 Again, I've read the papers. I do have a few
14:50:32 17 questions and I would purpose to a make a series of rulings on
14:50:36 18 each and every issue that's presented.

14:50:36 19 Does anybody need to take a comfort break before we
14:50:49 20 proceed? Very good. Mr. Lake, you have the floor.

14:50:50 21 **MR. LAKE:** Thank you, Your Honor.

14:50:52 22 Right now we're just talking about the 175 or so
14:50:55 23 emails that when you issued your order on July 1st, 2011 were to
14:51:01 24 be produced by the Defendants.

14:51:03 25 If you recall at the time, we were arguing and

14:51:06 1 negotiating that particular order. The fear that was presented
14:51:20 2 by the defense was that if we didn't provide the Plaintiff's
14:51:20 3 information first and we received their emails, that Paul Ceglia
14:51:20 4 would somehow run out and fabricate some other emails.

14:51:25 5 That was the argument that was made. We didn't think
14:51:27 6 that was something that was plausible, but we understood it and
14:51:31 7 agreed that if we produced our information, that within five
14:51:34 8 days they would be presented and they would give us the emails.

14:51:37 9 Compliant with the order, we produced all the
14:51:40 10 information that we had. I did a very, I think above and beyond
14:51:46 11 diligent search for everything that I could find.

14:51:48 12 We coordinated that the production of that information
14:51:51 13 in three cities, Sarasota, Buffalo, Chicago simultaneously. We
14:51:55 14 produced difference forensic images, as well as hard drives and
14:52:00 15 discs and everything we could. We were trying to coordinate
14:52:03 16 everything together. We put it all out, we gave it to their
14:52:09 17 experts, Stroz Friedberg, and they took it and started to do
14:52:12 18 their relevant search for what they were looking for.

14:52:16 19 No where in the order that I read says that there was
14:52:19 20 a condition precedent that we had to in some way comply with the
14:52:25 21 order based upon their interpretation, that was allow them any
14:52:31 22 grounds to violate the order. Rather, they were supposed to
14:52:35 23 provide them five days after. They didn't.

14:52:37 24 There's no condition precedent and even if there was,
14:52:40 25 it was met. It was met first when everything was submitted to

14:52:45 1 Stroz and it was even further complied with, even though I don't
14:52:50 2 think it was necessary, when the certifications were filed by me
14:52:53 3 and Mr. Ceglia saying that we had produced everything that was
14:52:59 4 within Mr. Ceglia's possession, custody and control. If that's
14:53:02 5 the case, then the time should have started ticking then, and
14:53:05 6 that would have been at the end of July.

14:53:08 7 Then even further, we had a series of meetings and
14:53:13 8 conversed through emails and letters where we, out of
14:53:16 9 professional courtesy, said you've seen everything, we've
14:53:20 10 certified everything, we'll give you until August 7th. Just
14:53:24 11 produce the emails because we're entitled to them. They still
14:53:28 12 refused.

14:53:29 13 We think that was a deliberate violation of the order.
14:53:32 14 It may have been because they disagreed with the interpretation
14:53:35 15 of the order. We were all here when it was written. We
14:53:38 16 complied to the best of our ability and we simply believe that
14:53:41 17 we're entitled to get those emails now. Simple as that.

14:53:45 18 **THE COURT:** Maybe not. Mr. Snyder?

14:53:47 19 **MR. SNYDER:** Thank you, Your Honor. Your Honor, this
14:53:51 20 does dovetail with our motion to compel in that it's our
14:53:56 21 position that the order by its terms does require the Plaintiff
14:54:02 22 to produce the electronic assets and then five days later we are
14:54:07 23 required to produce the so-called Harvard emails.

14:54:12 24 We had the Harvard emails ready on a disc on the 20th,
14:54:16 25 which would have been our production date had the Plaintiff

14:54:19 1 produced the electronic assets as required. He failed miserably
14:54:24 2 to comply with the order in numerous material ways.

14:54:27 3 We met and conferred with Mr. Lake, pointed out this
14:54:32 4 serious lapse in omission. By way of example, Your Honor, the
14:54:36 5 authentic contract, which we will address later, the one that in
14:54:40 6 2004 this Plaintiff acknowledged was the authentic contract was
14:54:46 7 found on the so-called Seagate computer.

14:54:50 8 That's a computer that this Plaintiff in a
14:54:55 9 certification identified in an affidavit earlier on in the case.
14:54:58 10 That on the 15th when he produced his electronic assets to us,
14:55:03 11 low and behold that one was not included. Somehow that one was
14:55:08 12 omitted, but we pointed that out. Three days later they coughed
14:55:11 13 that one up. That was on the 18th, three days after the due
14:55:15 14 date.

14:55:16 15 That gave us serious concern because it was not
14:55:19 16 coincidence, now that we know the true facts. That one computer
14:55:21 17 he failed to give us was the computer on which the authentic
14:55:25 18 contract was ultimately located.

14:55:27 19 There are other material ways which are essential to
14:55:31 20 our motion to compel in which this Plaintiff failed to produce
14:55:35 21 his electronic assets.

14:55:37 22 **THE COURT:** Well, let's stick with the language of the
14:55:39 23 order.

14:55:39 24 **MR. SNYDER:** Sure.

14:55:40 25 **THE COURT:** It says the Plaintiff shall produce by the

14:55:42 1 15th a series of electronic assets, if you will or however you
14:55:50 2 want to describe it, including electronic files, computers,
14:55:55 3 electronic media and the like.

14:55:57 4 **MR. SNYDER:** Yes.

14:55:58 5 **THE COURT:** And then five days after such production
14:56:05 6 -- we didn't number these paragraphs. We probably should have.
14:56:11 7 It's on the bottom of page two that five days subsequent to that
14:56:13 8 production of the so-called electronic assets and his sworn
14:56:15 9 declaration, Defendants shall produce the emails that are at
14:56:19 10 issue, correct, Mr. Lake? That's what you're referring to,
14:56:23 11 captured from Mr. Zuckerberg's Harvard email account. Which
14:56:28 12 apparently there are such documents, correct, Mr. Snyder?

14:56:30 13 **MR. SNYDER:** Yes, and they reside on a disc and they
14:56:33 14 were ready to be produced had he produced the electronic assets
14:56:45 15 in the sworn declaration --

14:56:45 16 **THE COURT:** Well, aside from the Seagate, which I
14:56:45 17 guess has now been resolved because you have it --

14:56:45 18 **MR. SNYDER:** We have it late, but we have not
14:56:45 19 received --

14:56:45 20 **THE COURT:** Well, there was something else. It was
14:56:46 21 the computer at home, at his parents' home?

14:56:49 22 **MR. SNYDER:** That was another one that --

14:56:50 23 **THE COURT:** Slipped passed them?

14:56:53 24 **MR. SNYDER:** -- slipped passed them.

14:56:55 25 **THE COURT:** But that's been corrected with an apology.

14:56:59 1 **MR. SNYDER:** That's been corrected with all sorts of
14:57:00 2 things. I haven't heard the apology, but --

14:57:04 3 **THE COURT:** I thought they indicated the fact that
14:57:05 4 they had overlooked --

14:57:05 5 **MR. SNYDER:** All right. Perhaps.

14:57:06 6 **THE COURT:** I'm trying to understand what else is --

14:57:08 7 **MR. SNYDER:** I'll tell you what's critical --

14:57:10 8 **THE COURT:** What else is it that is out there that you
14:57:12 9 haven't got that was --

14:57:13 10 **MR. SNYDER:** If Your Honor recalls that the grave
14:57:16 11 concern we had is that the amended complaint --

14:57:19 12 **THE COURT:** Yes, I --

14:57:19 13 **MR. SNYDER:** It was the email that gave us concern
14:57:28 14 because of course we believe if we gave them the authentic
14:57:31 15 Harvard emails when he produced his so-called emails, he would
14:57:31 16 create more fiction.

14:57:35 17 What this Plaintiff failed to do on the 15th, as
14:57:38 18 required by this Court, is produce any electronic native email
14:57:43 19 files. Remember, Your Honor, Stroz Friedberg swore to this
14:57:47 20 Court that the bogus emails were counted in the amended
14:57:51 21 complaint.

14:57:51 22 **THE COURT:** Well, is there a difference between the
14:57:53 23 email files he did produce and the native version thereof?

14:57:56 24 **MR. SNYDER:** Yes. What he gave us, Your Honor, are
14:57:58 25 floppy discs that contain cut and paste jobs that he wants

14:58:03 1 everyone to believe were once actual emails. What he did not
14:58:06 2 produce, Your Honor, was a single --

14:58:08 3 **THE COURT:** Excuse me. Were there any emails on the
14:58:11 4 floppy disc?

14:58:11 5 **MR. SNYDER:** No, they were documents which purport to
14:58:14 6 be emails. Meaning to say, they were cut and paste jobs of
14:58:18 7 words on pages, which the Plaintiff and the Plaintiff alone word
14:58:22 8 -- it required, in other words --

14:58:25 9 **THE COURT:** Do you have any examples of it so I could
14:58:28 10 see what --

14:58:28 11 **MR. SNYDER:** Yes, we'll get you examples.

14:58:30 12 **THE COURT:** I mean, where did you come up with the
14:58:32 13 words cut and paste?

14:58:33 14 **MR. SNYDER:** In other words, they're not real emails.

14:58:34 15 **THE COURT:** How do you know that?

14:58:36 16 **MR. SNYDER:** Because they're not on the Harvard server
14:58:38 17 because they are factually inconsistent with the historical
14:58:44 18 facts of the time. And because, Your Honor, they're no where to
14:58:49 19 be found on any of the computers that he gave us.

14:58:51 20 What was found on the computers that he gave us, the
14:58:54 21 2004 email with the authentic contract. And isn't it telling,
14:58:58 22 Your Honor, that the authentic contract is attached to actual
14:59:02 23 emails in native form in an email account on this Plaintiff's
14:59:02 24 Seagate computer?

14:59:08 25 **THE COURT:** What do you mean by "native"?

14:59:09 1 **MR. SNYDER:** Meaning it's native to resident on the
14:59:16 2 actual computer and found in the sent box of an email account,
14:59:22 3 which this Plaintiff used on his Seagate computer. So he had a
14:59:28 4 Outlook account that he used to send and receive emails in 2004.

14:59:33 5 Our experts found that email account, went to sent
14:59:37 6 box. In the sent box found --

14:59:39 7 **THE COURT:** Found an email account where?

14:59:41 8 **MR. SNYDER:** On the Seagate computer, which he
14:59:46 9 produced. On that account on his computer were the emails in
14:59:52 10 2004 that he sent to Mr. Cole, which attached the authentic
14:59:58 11 contract, the StreetFax contract that had nothing to do with
15:00:02 12 Facebook.

15:00:02 13 But, Your Honor, the so-called emails that he quotes
15:00:06 14 in the amended complaint are no where to be found on any
15:00:09 15 computers that he gave us. They're only on floppy discs as Word
15:00:15 16 documents, which are not attached to any computer, not attached
15:00:19 17 to any metadata, which would date and corroborate and
15:00:24 18 authenticate the so-called emails, and whose authenticity turns
15:00:32 19 on the Plaintiff's word and the Plaintiff's word alone. And
15:00:35 20 that's why we've cross-moved Your Honor to compel Plaintiff to
15:00:39 21 consent to the acquisition of his webmail account, Gmail --

15:00:44 22 **THE COURT:** Just a second. I'm trying to focus on
15:00:46 23 whether he's turned over all of the electronic assets. You're
15:00:51 24 saying that these -- I guess I'm not sure what you're saying at
15:00:57 25 this point.

15:00:57 1 **MR. SNYDER:** Right. So the point --

15:00:57 2 **THE COURT:** You have documents on the Seagate
15:01:00 3 computer, which you claim are not emails?

15:01:03 4 **MR. SNYDER:** No, they are emails, Your Honor.

15:01:05 5 **THE COURT:** I thought you said they weren't?

15:01:06 6 **MR. SNYDER:** No, the Seagate emails --

15:01:08 7 **THE COURT:** Excuse me --

15:01:09 8 **MR. SNYDER:** The floppy discs are bogus Word documents
15:01:13 9 that are --

15:01:13 10 **THE COURT:** So how does that bear on the issue that I
15:01:15 11 have to decide he is not entitled to his discovery?

15:01:19 12 **MR. SNYDER:** He has not turned over to us any native
15:01:22 13 email files.

15:01:26 14 **THE COURT:** How would you know if an email file on
15:01:31 15 these supposed emails, if you saw them --

15:01:35 16 **MR. SNYDER:** This goes to the USB device, Your Honor,
15:01:39 17 because this Plaintiff, since the commencement of this lawsuit,
15:01:45 18 accessed, Your Honor, remote storage devices, USB devices, on
15:01:56 19 which he had files that were critical to this lawsuit. He did
15:01:59 20 not identify them in his sworn certification to the Court, he
15:02:03 21 concealed them and now they're destroyed or secreted somewhere.

15:02:08 22 Those devices though left a digital fingerprint on the
15:02:13 23 Plaintiff's computers and on the Plaintiff's computer files.
15:02:15 24 And those devices, Your Honor, go to the heart of this case and
15:02:20 25 Plaintiff's fraud.

15:02:21 1 And our experts were able to determine that those
15:02:24 2 devices were used by this Plaintiff since the lawsuit was
15:02:36 3 commenced and contained files that included Zuckerberg contract
15:02:36 4 page two dot TIFF. Remember, the TIFF file is what the
15:02:37 5 authentic contract was in.

15:02:39 6 **THE COURT:** What you claim is the authentic contract.

15:02:50 7 **MR. SNYDER:** Well, I could erect that, Your Honor, in
15:02:50 8 detail. The other file was Zuckerberg contract page one dot
15:02:51 9 TIFF. Those were extracted from the computer, erased from the
15:02:56 10 computer, put on a storage device.

15:03:01 11 The storage device was taken off the computer, just
15:03:03 12 like this, Your Honor, pulled off the computer, thrown in the
15:03:06 13 river, destroyed, hidden, not produced to us.

15:03:09 14 **THE COURT:** Or as you suggest, Lake Erie.

15:03:12 15 **MR. SNYDER:** Lake Erie. I thought the Hudson River
15:03:15 16 would be too parochial so we used Lake Erie.

15:03:20 17 **THE COURT:** And what you just gestured to was a flash
15:03:26 18 drive, correct?

15:03:26 19 **MR. SNYDER:** Yes. This is grave a situation of
15:03:27 20 spoliation in a case that is imaginable.

15:03:30 21 **THE COURT:** If it is spoliation.

15:03:32 22 **MR. SNYDER:** Well, Your Honor, let's just say,
15:03:34 23 Plaintiff's excuse for not producing this critical evidence is,
15:03:37 24 quote --

15:03:37 25 **THE COURT:** Excuse me. I'm trying to understand the

15:03:40 1 notion of the fact that are you saying that there are documents
15:03:44 2 on the floppies that purport to be emails, but really aren't?

15:03:49 3 **MR. SNYDER:** Yes.

15:03:49 4 **THE COURT:** Because they're not in native form?

15:03:51 5 **MR. SNYDER:** Yes.

15:03:52 6 **THE COURT:** Native form is what you mean by native
15:03:56 7 format, correct?

15:03:56 8 **MR. SNYDER:** Yes. And, Your Honor, there are
15:03:59 9 documents --

15:03:59 10 **THE COURT:** My question is so what. You have the
15:04:04 11 Seagate and you have the floppy discs and --

15:04:08 12 **MR. SNYDER:** And he has not produced any of -- any
15:04:08 13 computer.

15:04:10 14 **THE COURT:** Why should I believe that there are some
15:04:15 15 -- well, apparently there are some other drives out there that
15:04:18 16 he --

15:04:19 17 **MR. SNYDER:** Correct.

15:04:19 18 **THE COURT:** -- didn't turn over --

15:04:20 19 **MR. SNYDER:** Correct.

15:04:21 20 **THE COURT:** -- because they were listed on the
15:04:23 21 confidentially log, is that right?

15:04:25 22 **MR. SNYDER:** Let me say it this way: When I -- yes.
15:04:26 23 When I present my motion to compel, there are so many serious
15:04:30 24 lapses here --

15:04:31 25 **THE COURT:** Well, just a second. What did they say in

15:04:32 1 response to that? What did you hear from Mr. --

15:04:35 2 **MR. SNYDER:** About the emails?

15:04:36 3 **THE COURT:** Well, the emails aren't really what's not
15:04:40 4 been turned over because you have what you have even though you
15:04:43 5 believe they're not authentic emails.

15:04:43 6 **MR. SNYDER:** Correct.

15:04:45 7 **THE COURT:** It's really that they're part of a paper
15:04:48 8 trail or a digital trail that leads you to believe that there
15:04:52 9 are other sources of relevant documents --

15:04:54 10 **MR. SNYDER:** Form example, on these --

15:04:55 11 **THE COURT:** -- on these mysterious drives.

15:04:57 12 **MR. SNYDER:** They're not mysterious, Your Honor. They
15:04:59 13 are --

15:04:59 14 **THE COURT:** Well, it's a mystery as to where they are.

15:05:01 15 **MR. SNYDER:** Right, they existed in the real world.

15:05:04 16 They left digital fingerprints on his computer.

15:05:05 17 **THE COURT:** I didn't mean phantom by mysterious.

15:05:07 18 **MR. SNYDER:** And they're exactly the kind of files
15:05:09 19 that the -- TIFF files that were attached to --

15:05:12 20 **THE COURT:** So what you are really are saying is you
15:05:15 21 have circumstantial evidence to believe that there are other
15:05:18 22 sources, i.e. drives, the USB drives.

15:05:21 23 **MR. SNYDER:** We believe, with all due respect --

15:05:24 24 **THE COURT:** Universal Serial Bus.

15:05:27 25 **MR. SNYDER:** Yes. And we believe, Your Honor, not to

15:05:31 1 mix words, it's direct and irrefutable scientific evidence that
15:05:33 2 this Plaintiff stored on remote storage devices files essential
15:05:39 3 to his fraud in this case. Indeed, one of the files is called
15:05:42 4 Facebook files. They then says he's unable to locate these
15:05:46 5 devices. This is implausible and not credible.

15:05:49 6 Remember, Your Honor, this is a man who saved hundreds
15:05:52 7 of floppy discs, supposedly, and CDs, supposedly, dating back a
15:05:57 8 decade, supposedly, containing these made-up emails, supposedly.
15:06:01 9 So this is the man who saves thousands of floppy discs per
15:06:07 10 decade, but the USB device with the first page and second
15:06:08 11 page --

15:06:09 12 **THE COURT:** Just a second. Can you take a pause here?

15:06:13 13 **MR. SNYDER:** Yes.

15:06:18 14 **THE COURT:** I need to consult my technical assistant.
15:06:18 15 For the record, this is Mr. Brian Loliger. He's the deputy
15:06:24 16 assistant manager of our information system.

15:07:21 17 **MR. SNYDER:** There's one other critical category --

15:07:23 18 **THE COURT:** They could have been on another computer
15:07:25 19 and then put on a drive, correct?

15:07:28 20 **MR. SNYDER:** The USB that was located by our forensic
15:07:33 21 experts was attached to specific computers, that's how we were
15:07:36 22 able to trace --

15:07:37 23 **THE COURT:** But they may be created on a another
15:07:41 24 computer and then temporarily stored on the drive?

15:07:44 25 **MR. SNYDER:** We don't know where they were created.

15:07:46 1 We know that the files existed on computers, that we have, were
15:07:50 2 moved onto a storage device, a storage device in Lake Erie or
15:07:55 3 somewhere else, and we don't have the documents on the computer
15:07:57 4 because they were wiped and they are somewhere on a disc or not.

15:08:01 5 There's another category though of electronic assets
15:08:04 6 that this Plaintiff willfully withheld and did not produce, and
15:08:08 7 this is critical as well. As Your Honor knows, it's our
15:08:15 8 position that the document attached to the complaint is a fraud,
15:08:19 9 a fabrication, a phoney.

15:08:20 10 So we asked this Plaintiff to produce to our experts
15:08:24 11 all electronic copies of the purported contract. What do you
15:08:29 12 know, we didn't get a single one.

15:08:31 13 All we have, Your Honor, is the two-page hard copy
15:08:35 14 document that is attached to the complaint and the purported
15:08:38 15 original that he made available for hard copy inspection, which
15:08:42 16 is suspicious and irregular.

15:08:47 17 **THE COURT:** What is your point about electronic
15:08:50 18 copies?

15:08:51 19 **MR. SNYDER:** He did not produce a single electronic
15:08:54 20 version of the bogus contract from his computer, from his CDs,
15:08:56 21 from his hundreds of floppy discs.

15:08:59 22 He didn't produce a single electronic image of the his
15:09:09 23 signed version of his bogus contract. He didn't produce any
15:09:09 24 electronic documents containing the unsigned version of the
15:09:11 25 contract that's attached to the complaint.

15:09:13 1 As a result, all we have is his two-page document
15:09:18 2 attached to the complaint and the piece of paper that he calls
15:09:22 3 an original.

15:09:23 4 **THE COURT:** Is it not possible that there aren't any?

15:09:26 5 **MR. SNYDER:** No, and I'll tell Your Honor why. His
15:09:28 6 experts have images that were scanned off of a computer.

15:09:31 7 **THE COURT:** His experts?

15:09:32 8 **MR. SNYDER:** Let me address this. What we did find,
15:09:36 9 Your Honor, only aggravates our concern and highlighted our
15:09:40 10 grave concerns about both the destruction of evidence and the
15:09:46 11 withholding of evidence, and why we didn't produce the emails.

15:09:50 12 What they did find are Plaintiff's test attempts at
15:09:54 13 creating a phoney document --

15:09:56 14 **THE COURT:** Your experts?

15:09:57 15 **MR. SNYDER:** Yes. We found seven unsigned electronic
15:10:02 16 drafts of the bogus contract that our experts said were telltale
15:10:06 17 practice forgeries, but they had different margins --

15:10:11 18 **THE COURT:** Where were they?

15:10:12 19 **MR. SNYDER:** They were found on the Plaintiff's
15:10:15 20 computer. And what we found, Your Honor, our experts found that
15:10:19 21 he had different margins, different spaces. They were irregular
15:10:23 22 on different ways on page one as the Plaintiff was trying to cut
15:10:23 23 and paste and manipulate words to create a bogus page one.

15:10:27 24 And what we found is not a single electronic version
15:10:32 25 of the signed copy. And none of these documents, the seven of

15:10:37 1 those versions, drafts of the two-page documents attached to the
15:10:41 2 complaint matched what was attached to the complaint. So
15:10:44 3 they're eight versions with different formats and margins and --

15:10:48 4 **THE COURT:** Is it possible that he erased them?

15:10:52 5 **MR. SNYDER:** Is it possible that he erased --

15:10:55 6 **THE COURT:** Deleted.

15:10:56 7 **MR. SNYDER:** The signed electronic copy -- well, he
15:11:00 8 had seven copies.

15:11:04 9 **THE COURT:** Hard copies?

15:11:05 10 **MR. SNYDER:** No, he had seven electronic copies of
15:11:09 11 different drafts of the bogus contract, different margins,
15:11:11 12 different spacing as he was trying to Jerry-rig page one to look
15:11:15 13 a certain way. But what we doesn't have on his computer is the
15:11:19 14 version that ultimately was printed out and attached to the
15:11:23 15 complaint.

15:11:24 16 **THE COURT:** And the reason for that would be that he
15:11:28 17 deleted it.

15:11:28 18 **MR. SNYDER:** He deleted it or he was required, Your
15:11:32 19 Honor, also in the order -- but it's not like a production
15:11:36 20 requirement.

15:11:36 21 He also was required, Your Honor, and this was
15:11:37 22 critical and it was discussed with Your Honor to both produce
15:11:40 23 and identify and he failed to identify any of this for us. He
15:11:45 24 failed to identify where the contracts were, what was the
15:11:48 25 authentic contract, what he purported to represent.

15:11:52 1 So we have now seven versions of fake forgeries or
15:11:57 2 practice forgeries. Which one does he contend is the so-called
15:12:01 3 contract? He can't contend any of them are the so-called
15:12:05 4 contract because none of them match what's attached to the
15:12:08 5 complaint. So our question is where is the electronic version
15:12:11 6 of the document that's attached to the complaint.

15:12:13 7 **THE COURT:** So if the Court agreed with you, my order
15:12:15 8 would be to comply fully with --

15:12:18 9 **MR. SNYDER:** Yes.

15:12:19 10 **THE COURT:** Let's see. The paragraph that requires
15:12:21 11 him to not only to produce it, but to identify --

15:12:25 12 **MR. SNYDER:** Yes, Your Honor.

15:12:25 13 **THE COURT:** -- as to the electronic version of the
15:12:30 14 final alleged contract between the parties?

15:12:34 15 **MR. SNYDER:** Yes, Your Honor.

15:12:35 16 **THE COURT:** And so if he gives you an affidavit saying
15:12:41 17 I don't have it, I don't know what happened to it, it may have
15:12:46 18 been -- I may have intentionally deleted it or unintentionally
15:12:51 19 deleted it, but I can't tell you more, that would be compliant?

15:12:56 20 **MR. SNYDER:** That would be partial compliance. There
15:12:59 21 are other ways in which he did not comply as well.

15:13:00 22 **THE COURT:** I know that, but as to that issue --

15:13:02 23 **MR. SNYDER:** I suppose so.

15:13:04 24 **THE COURT:** Okay.

15:13:05 25 **MR. SNYDER:** Plaintiff did not produce a single --

15:13:07 1 **THE COURT:** What's the next issue I have? Are you
15:13:10 2 going to go through each one?

15:13:13 3 **MR. SNYDER:** If it's helpful to the Court.

15:13:14 4 **THE COURT:** Because the question is whether he is in
15:13:16 5 compliance or not so as to trigger your obligation and how many
15:13:21 6 more examples of non-compliance, which could result in an order
15:13:27 7 from the Court from that would, number one, forgo any
15:13:29 8 obligations on your part agreeing with you that the discovery,
15:13:33 9 if you will or production, was to be sequential and conditional
15:13:38 10 on the one hand and on the other hand, provide enforcement of
15:13:43 11 the order by virtue of further order compelling him to provide
15:13:49 12 these supplemental disclosures.

15:13:51 13 **MR. SNYDER:** The way I count that, I think there are
15:13:54 14 five ways in which he --

15:13:54 15 **THE COURT:** I'm trying to assist Mr. Lake so he knows
15:13:57 16 when he is expected to attempt to rebut.

15:13:57 17 **MR. SNYDER:** I think there are five categories I'd
15:14:00 18 like to --

15:14:00 19 **THE COURT:** We just discussed one, the first category?

15:14:04 20 **MR. SNYDER:** Okay. The first category in no
15:14:08 21 particular order is his failure to produce the USB device or --

15:14:12 22 **THE COURT:** Or devices.

15:14:13 23 **MR. SNYDER:** Or devices, right.

15:14:13 24 **THE COURT:** This would be the -- what's the word I'm
15:14:18 25 looking for?

15:14:18 1 **MR. SNYDER:** Pen drives.

15:14:21 2 **THE COURT:** The undisclosed drives --

15:14:21 3 **MR. SNYDER:** Yes.

15:14:22 4 **THE COURT:** -- that were attached and upon which
15:14:24 5 materials were created, arguably in native format, but are now
15:14:31 6 not produced because you don't have the drives so you don't know
15:14:35 7 what's on there.

15:14:36 8 **MR. SNYDER:** We do know what's on there and that's why
15:14:38 9 it is so serious, Your Honor. What's on there -- a digital
15:14:49 10 fingerprint was left on the computer. We can trace from the
15:14:49 11 computer to the now destroyed or secreted --

15:14:50 12 **THE COURT:** Drives.

15:14:51 13 **MR. SNYDER:** -- storage device the following files,
15:14:52 14 Zuckerberg contract page one dot TIFF, Zuckerberg contract page
15:14:58 15 two dot TIFF in a folder labelled Facebook files. Again, the
15:15:04 16 very same type of TIFF image files as the authentic contract
15:15:10 17 from 2004.

15:15:10 18 **THE COURT:** Okay.

15:15:11 19 **MR. SNYDER:** And those are gone and the Plaintiff
15:15:13 20 either should produce the storage devices and the documents that
15:15:17 21 are on them or provide a certification telling the Court why,
15:15:21 22 since the commencement of the lawsuit he accessed them, but why
15:15:26 23 today they're either gone or supposedly lost. That's the first
15:15:32 24 category.

15:15:32 25 **THE COURT:** Or you could depose him.

15:15:35 1 **MR. SNYDER:** I don't think there's any -- I think it
15:15:36 2 speaks for itself. It's difficult to imagine more willful
15:15:42 3 spoliation than that when the question in the case is where is
15:15:44 4 the authentic page one of the contract --

15:15:44 5 **THE COURT:** I think that we're all familiar with the
15:15:49 6 reasonable case law of spoliation issues and electronic
15:15:51 7 discovery. And we know that conceivably when you have a
15:15:55 8 spoliation issue, the Court may require an evidentiary hearing.

15:16:00 9 I'm trying to avoid doing that and I'm trying to keep
15:16:04 10 clear for everybody's benefit this afternoon that we're not here
15:16:07 11 to accuse the Plaintiff of spoliation.

15:16:12 12 You may think that has occurred, but as far as the
15:16:17 13 Court is concerned, the only issue before it is whether or not
15:16:20 14 there is enough of an indication that there is more out there
15:16:24 15 that needs to be produced by the Plaintiff before your
15:16:27 16 obligation, which it is sequential, to produce the so-called
15:16:31 17 Harvard emails is triggered. That's all I want to be clear
15:16:35 18 about.

15:16:35 19 **MR. SNYDER:** The first category --

15:16:37 20 **THE COURT:** If you need -- if you think you need to
15:16:39 21 depose him or to understand whether or not -- I mean, you can
15:16:45 22 see the two things get very interrelated at some point.

15:16:50 23 I mean, on the one hand is there a something showing
15:16:54 24 that he has failed to fully comply with discovery obligations
15:16:56 25 under the order. That's what we're discussing. And if they're

15:16:59 1 not what amounts to spoliation, it is arguably closely related
15:17:04 2 issue depending on what we find.

15:17:04 3 **MR. SNYDER:** And I would suggest, Your Honor, that I
15:17:06 4 agree, and in the future when we present the Court with our full
15:17:12 5 finding of the forensic examination and other information and
15:17:15 6 these discovery issues are resolve one way or another --

15:17:18 7 **THE COURT:** Could you just -- so we can move ahead
15:17:20 8 here, we're not running out of time, but just --

15:17:24 9 **MR. SNYDER:** The second --

15:17:25 10 **THE COURT:** -- quickly denominate -- we've got item 1,
15:17:28 11 those are the so-called USB devices. If you could just for the
15:17:32 12 record so I can call upon Mr. Lake to respond --

15:17:34 13 **MR. SNYDER:** He should be required to produce --

15:17:38 14 **THE COURT:** What are the other four items that give
15:17:41 15 rise to the current belief that he's not fully complied to the
15:17:42 16 order so as to trigger your obligations to produce?

15:17:44 17 **MR. SNYDER:** He should identify and produce all
15:17:49 18 electronic copies of the purported contract. He's failed to do
15:17:54 19 that.

15:17:54 20 **THE COURT:** We've talked about that.

15:17:55 21 **MR. SNYDER:** He should identify and produce all of
15:17:57 22 the --

15:17:57 23 **THE COURT:** This is number three?

15:17:59 24 **MR. SNYDER:** Yes. All of the forms described in
15:18:02 25 paragraph eight of the Plaintiff's June 12th, 2011 declaration.

15:18:08 1 Those are the forms from which the contract was actually
15:18:15 2 created. He's failed to identify those or produce any
15:18:22 3 electronic assets containing those files.

15:18:24 4 **THE COURT:** Are these items listed in Mr. Southwell's
15:18:29 5 declaration?

15:18:31 6 **MR. SNYDER:** Yes, Your Honor.

15:18:32 7 **THE COURT:** And that would be, just in the interest of
15:18:34 8 time perhaps, if you could give me a reference to -- I know I
15:18:37 9 saw it. I'm just looking for it now so we can perhaps move more
15:18:43 10 quickly here. These would be pages -- we've got page 13 and 14.
15:18:54 11 We've got electronic images of the StreetFax agreement. I think
15:19:00 12 those were the ones you were referring to. Six removable media
15:19:07 13 devices would be the so-called missing drives. And then are the
15:19:10 14 other items listed somewhere that I could look at and follow
15:19:14 15 along with you?

15:19:17 16 **MR. SNYDER:** Yes. One moment, Your Honor.

15:19:19 17 **THE COURT:** Sure. And again, for Mr. Lake's benefit
15:19:23 18 too if you can --

15:19:47 19 **MR. LAKE:** There's a list on page four in their reply
15:19:53 20 under heading two, electronic documents.

15:19:56 21 **THE COURT:** That would be doc number 110?

15:19:59 22 **MR. LAKE:** Yes, page four at the bottom, Roman numeral
15:20:04 23 II, paragraph A, first paragraph.

15:20:14 24 **THE COURT:** Well, I knew I saw something in
15:20:19 25 Southwell's affidavit, but now I realize it wasn't quite as

15:20:21 1 complete as I thought. It covers two of the items we've just
15:20:27 2 discussed with Mr. Snyder.

15:20:29 3 **MR. SNYDER:** I can go over the request, Your Honor. I
15:20:32 4 haven't --

15:20:32 5 **THE COURT:** And the request of them are the categories
15:20:35 6 at the bottom of page four, is that it? The June 12th
15:20:46 7 declaration.

15:20:47 8 **MR. SNYDER:** Your Honor, page 10 of our brief filed on
15:20:57 9 August 4th has a nice summary --

15:21:15 10 **THE COURT:** What's the date of the brief again?

15:21:17 11 **MR. SNYDER:** Yes, Your Honor, it's August 4th.

15:21:32 12 **THE COURT:** What page?

15:21:33 13 **MR. SNYDER:** Yes, Your Honor, page 10.

15:21:35 14 **THE COURT:** We're looking at the first full paragraph?

15:21:37 15 **MR. SNYDER:** Right.

15:21:38 16 **THE COURT:** So is this the same listing of
15:21:41 17 unsatisfactory issues, production issues, as recapitulated at
15:22:01 18 the bottom of page four of the doc number 110, the so-called
15:22:01 19 Defendants' reply? I just want to make sure we have everything
15:22:01 20 in front of us right here.

15:22:05 21 Page 10 refers to, while you're looking yourselves,
15:22:08 22 native electronic version of the purported contract. Native
15:22:12 23 electronic version being the native format of it, just so we're
15:22:21 24 using correct terminology. And then all electronic copies of
15:22:28 25 the purported contract, including those in the possession of his

15:22:32 1 attorneys or his experts --

15:22:34 2 **MR. SNYDER:** And that's critical, Your Honor, because
15:22:36 3 we believe that the fraudulent contract changed over time and
15:22:41 4 that versions that his experts, his agents, may have or do have
15:22:47 5 may indeed be similar to the version A that was attached to the
15:22:53 6 complaint --

15:22:53 7 **THE COURT:** The only word is may.

15:22:54 8 **MR. SNYDER:** Well, we know that -- and produced in
15:22:58 9 hard copy form to us so we want to see those electronic images.

15:23:04 10 **THE COURT:** I understand. And then the next category
15:23:07 11 or part of the second one is mentioned about the purported
15:23:11 12 contracts are those in any webmail account.

15:23:16 13 And you think that -- let see here. And you think or
15:23:19 14 that you thought that you should order then from the acquisition
15:23:25 15 and inspection of the webmail account by your expert Stroz
15:23:30 16 Friedberg.

15:23:30 17 **MR. SNYDER:** Yes, Your Honor.

15:23:31 18 **THE COURT:** And that's not an issue that was addressed
15:23:33 19 with the order?

15:23:33 20 **MR. SNYDER:** No, Your Honor, and that was a new
15:23:35 21 request which we raised, and I raised moments ago, which is
15:23:38 22 that, we believe, Your Honor --

15:23:39 23 **THE COURT:** But he did not disclose having such email
15:23:42 24 accounts.

15:23:42 25 **MR. SNYDER:** We know that he has at least --

15:23:43 1 **THE COURT:** Well, he hasn't disclosed it in any
15:23:46 2 declaration?

15:23:46 3 **MR. SNYDER:** No, Your Honor.

15:23:47 4 **THE COURT:** Do you think he has one?

15:23:48 5 **MR. SNYDER:** We know he has at least two, one is a
15:23:52 6 Gmail account and the other is a Hotmail or Microsoft account.
15:23:57 7 And we believe that those, given the overwhelming evidence of
15:24:01 8 fraud before the Court and discovery misconduct, may well
15:24:07 9 contain additional evidence of fraud.

15:24:10 10 **THE COURT:** And how do you know that he has this, what
15:24:13 11 you call, Gmail account and a so-called Hotmail account?

15:24:18 12 **MR. SNYDER:** He's been CCed in different emails that
15:24:21 13 have come into our possession that contain those addresses.

15:24:27 14 **THE COURT:** So there is a discrepancy between his
15:24:31 15 declaration and the facts?

15:24:32 16 **MR. SNYDER:** Well, he didn't identify those accounts,
15:24:34 17 no.

15:24:35 18 **THE COURT:** Right. Okay. And then the last -- not
15:24:38 19 the last category. The next category is electronic forms
15:24:45 20 described in the June 12th declaration.

15:24:47 21 **MR. SNYDER:** Those are the so-called forms that claims
15:24:49 22 he used to create the contract attached to the complaint. I
15:24:52 23 guess the templates or the forms that he claims to have filled
15:24:56 24 in when we created the account and we have no electronic copies
15:25:03 25 of any such forms.

15:25:05 1 **THE COURT:** Was the June 12th declaration an Exhibit
15:25:08 2 to any of the documents, June 14th perhaps?

15:25:16 3 **MR. SNYDER:** I can approach and hand it to Your Honor.

15:25:33 4 **THE COURT:** And that would be in paragraph -- what
15:25:35 5 paragraph would you be referring to there?

15:25:42 6 **MR. SNYDER:** Paragraph eight, Your Honor.

15:25:43 7 **THE COURT:** Paragraph eight. All right. Mr. Lake,
15:25:48 8 make a note of it. We're talking about the forms referred to in
15:25:51 9 paragraph eight. They are claiming that they're looking for the
15:25:57 10 electronic version of those forms. Is that specifically what
15:26:02 11 hasn't been produced?

15:26:04 12 **MR. SNYDER:** He has not identified or produced any
15:26:07 13 such forms and I just want to emphasize again, the
15:26:12 14 identification requirement was critical to the order because of
15:26:18 15 our concerns that he was not going to point out where documents
15:26:24 16 were or what documents represented the so-called contract.

15:26:29 17 **THE COURT:** And then the original or again so-called
15:26:32 18 native electronic or native form -- you don't have the word
15:26:37 19 format in there, but you say native electronic files consisting
15:26:43 20 of or containing the purported emails.

15:26:47 21 **MR. SNYDER:** Yes, and that goes to the issue that all
15:26:50 22 he's produced to us are floppy discs that contain Word document
15:26:50 23 files, but not the native email files.

15:26:54 24 And the difference, Your Honor, is important of
15:26:58 25 course. I can show Your Honor the difference. We have the 2004

15:27:02 1 email that this Plaintiff sent, by which we looked at earlier
15:27:05 2 today, attaching page one and page two of the StreetFax contract
15:27:10 3 are native emails.

15:27:13 4 What's he's attached -- what he's cut and pasted by
15:27:17 5 his own admission onto a Word document is not a native email.
15:27:22 6 It's a Word document that he says represents a pasting of an
15:27:27 7 email that he took from a native format, but he hasn't produced
15:27:31 8 any native format.

15:27:32 9 And the irony here is what we're purporting to
15:27:36 10 produce, once he is in compliance, are native emails from Mark
15:27:41 11 Zuckerberg's Harvard account, which contain none of the
15:27:47 12 so-called emails recited in the narrative and in the amended
15:27:50 13 complaint. So we want him to produce all native email files
15:27:57 14 containing the purported emails. He's produced none.

15:29:07 15 **THE COURT:** My technical assistant tells me that some
15:29:12 16 of these forms in native form could be on a server somewhere and
15:29:17 17 Mr. Ceglia might not know how to actually produce them, is that
15:29:28 18 not true?

15:29:28 19 **MR. SNYDER:** I don't know what he knows or does not
15:29:28 20 know, but I know he was required to identify and produce the
15:29:28 21 forms and he didn't do either. And if he didn't do that --

15:29:32 22 **THE COURT:** I mean, if he told you how he came to have
15:29:35 23 access to these forms, that would be -- and if from his
15:29:40 24 explanation it was clear that they did not reside on his
15:29:43 25 computer, that would be satisfactory, wouldn't it?

15:29:45 1 **MR. SNYDER:** We would then evaluate that at the time.

15:29:47 2 **THE COURT:** Okay. Thank you.

15:29:48 3 **MR. SNYDER:** And the final category which is the USB
15:29:51 4 devices, which we've already addressed, Your Honor.

15:29:54 5 **THE COURT:** Yes, okay. And your view is that until he
15:29:57 6 provides that, there is still the risk that, as I remember you
15:30:08 7 very saliently drawing the Court's attention to that Mr. Ceglia,
15:30:12 8 in your view, could attempt to manufacture evidence, if you
15:30:15 9 will.

15:30:15 10 **MR. SNYDER:** Yes, Your Honor, in light of the ample
15:30:18 11 evidence --

15:30:18 12 **THE COURT:** To respond to what he received --

15:30:20 13 **MR. SNYDER:** Yes.

15:30:21 14 **THE COURT:** -- from Mr. Zuckerberg before he -- the
15:30:23 15 record of his electronic -- his electronic records going to the
15:30:29 16 purported contract have been pinned down, if you will.

15:30:33 17 **MR. SNYDER:** Yes, and in forming that is not only the
15:30:33 18 fact or facts that we brought before the Court about the fraud
15:30:38 19 that he's perpetrated, but also the recent discoveries from the
15:30:42 20 forensic testing, which show that this Plaintiff, Your Honor,
15:30:45 21 has recently been in the past several months engaged in
15:30:50 22 backdating, manipulation and alteration of numerous documents,
15:31:01 23 which when we present our report to the Court, will be fully
15:31:06 24 explicated. But we did not make the decision to not produce the
15:31:10 25 emails with that consideration of all the facts.

15:31:13 1 And an important one was the fact that this Plaintiff,
15:31:17 2 in addition to destroying or spoliating this device, also was
15:31:23 3 engaged in backdating and manipulation of critical documents
15:31:28 4 that go to the heart of this case. And until and unless he --

15:31:35 5 **THE COURT:** What's the best example of this alleged
15:31:39 6 backdating, please?

15:31:40 7 **MR. SNYDER:** There is ample evidence on this
15:31:43 8 Plaintiff's computer that he has been, since the date of this
15:31:44 9 lawsuit, manipulating dates and dating applications to backdate
15:31:48 10 documents.

15:31:49 11 **THE COURT:** As regard to this case?

15:31:52 12 **MR. SNYDER:** Yes, Your Honor.

15:31:53 13 **THE COURT:** Or regard to something else?

15:31:55 14 **MR. SNYDER:** This case.

15:31:56 15 **THE COURT:** Can you give me an example?

15:31:57 16 **MR. SNYDER:** I think at this point, no, Your Honor,
15:32:00 17 because there are still some documents that are designated as
15:32:04 18 confidential.

15:32:04 19 **THE COURT:** Had I upheld it as confidential?

15:32:07 20 **MR. SNYDER:** Yes, Your Honor. And that's something
15:32:09 21 that we can address --

15:32:10 22 **THE COURT:** And what items are they? I mean,
15:32:29 23 everything I see on here goes back to the 2003, 2004 timeframe.

15:32:34 24 **MR. LAKE:** Again, Your Honor, I think we are treading
15:32:37 25 into protected water.

15:32:39 1 **THE COURT:** I just want to know what we overlooked.

15:32:42 2 **MR. SNYDER:** For example, Your Honor --

15:32:42 3 **MR. LAKE:** You didn't.

15:32:43 4 **MR. SNYDER:** There's an application that techie's use
15:32:49 5 called a hex editor and it is something that is used to
15:33:08 6 manipulate metadata on a computer, including to manipulate the
15:33:13 7 dates attached to different documents. There's ample evidence
15:33:18 8 that --

15:33:18 9 **THE COURT:** Well, I think you told me about that when
15:33:20 10 we first considered this back in June --

15:33:23 11 **MR. SNYDER:** Yes.

15:33:23 12 **THE COURT:** -- that there is indeed a website that you
15:33:26 13 can go to that teaches you how to make --

15:33:28 14 **MR. SNYDER:** Yes.

15:33:29 15 **THE COURT:** -- documents appear to have a different
15:33:31 16 creation date than actually was the case.

15:33:34 17 **MR. SNYDER:** Absolutely.

15:33:35 18 **THE COURT:** Is that what you're talking about?

15:33:36 19 **MR. SNYDER:** Yes, Your Honor.

15:33:37 20 **THE COURT:** It's the same program you're referring to?

15:33:39 21 **MR. SNYDER:** It's one of many -- or several that exist
15:33:43 22 to accomplish that end. And what's relevant about it here, Your
15:33:46 23 Honor, and not to get into the nuts and bolts of it --

15:33:49 24 **THE COURT:** You're saying that some of these documents
15:33:51 25 that I thought were technical and/or personal, if not

15:33:56 1 business-based, back in the time when they were created were
15:34:00 2 fabricated --

15:34:00 3 **MR. SNYDER:** No.

15:34:01 4 **THE COURT:** -- and put up on the privileged log?

15:34:03 5 **MR. SNYDER:** No, were test-runs of that program.

15:34:08 6 **THE COURT:** So why wasn't that revealed to me on
15:34:13 7 privilege log?

15:34:14 8 **MR. SNYDER:** This is something that when we give our
15:34:17 9 full report, pursuant the Court's order, we're going to bring to
15:34:21 10 the Court's attention because the experts are still in the
15:34:24 11 process of evaluating the data.

15:34:27 12 For example, if Your Honor looks at documents 41 and
15:34:32 13 42 and 43 --

15:34:32 14 **THE COURT:** The ones that --

15:34:32 15 **MR. SNYDER:** Yes.

15:34:33 16 **THE COURT:** -- we discussed earlier that look like
15:34:35 17 technical information to me?

15:34:37 18 **MR. SNYDER:** Yes. In fact, those are documents,
15:34:38 19 without revealing their substance because they are still
15:34:42 20 confidential, which demonstrate this Plaintiff's use of this
15:34:45 21 computer program, which is used to cut and paste and manipulate
15:34:51 22 documents.

15:34:53 23 **THE COURT:** So where it says in the document here that
15:34:56 24 it's a doc file that appears to be the test results of modifying
15:35:01 25 a Microsoft Word document, that's what you're referring to?

15:35:04 1 **MR. SNYDER:** Yes, Your Honor.

15:35:05 2 **THE COURT:** How would I know that?

15:35:07 3 **MR. SNYDER:** You would not, Your Honor. But when we
15:35:09 4 would report to Your Honor next month pursuant to the order --

15:35:14 5 **THE COURT:** So you're going to ask me to reconsider my
15:35:17 6 ruling as to those items?

15:35:19 7 **MR. SNYDER:** Yes, but we thought it appropriate to do
15:35:22 8 so once the forensic testing was completed.

15:35:36 9 **THE COURT:** Okay.

15:35:36 10 **MR. SNYDER:** Which we can't do until this Plaintiff is
15:35:36 11 in compliance. In addition, Your Honor --

15:35:36 12 **THE COURT:** I was trying to get Mr. Lake to respond.

15:35:36 13 **MR. SNYDER:** One of the other reasons why we did not
15:35:36 14 produce the emails was his requirement was not only to produce
15:35:40 15 electronic assets, but to provide a certification.

15:35:43 16 He provided a document which purported to be a
15:35:47 17 certification, but it was so manifestly incomplete and false
15:35:51 18 that it gave us additional concern about the integrity.

15:35:57 19 **THE COURT:** So if I direct him to either identify,
15:35:59 20 produce or explain the four or five categories of
15:36:05 21 incompleteness, if I can use that term --

15:36:06 22 **MR. SNYDER:** Yes.

15:36:06 23 **THE COURT:** -- as a euphemism here, and then ask him
15:36:14 24 to recertify based on that production, that will then trigger
15:36:18 25 your obligation to --

15:36:20 1 **MR. SNYDER:** If he is in compliance for sure. We have
15:36:23 2 nothing to hide with those Harvard emails. We are happy to
15:36:28 3 provide them once he is in compliance.

15:36:30 4 **THE COURT:** Yes, but the problem -- you're a judicial
15:36:33 5 officer, as I am, presiding here. If he is in compliance,
15:36:37 6 according to your view --

15:36:39 7 **MR. SNYDER:** Well, I think in --

15:36:40 8 **THE COURT:** -- how do I finally decide ultimately
15:36:42 9 whether he is in compliance or not unless I let you depose him
15:36:48 10 and ultimately have a hearing when I assess credibility?

15:36:51 11 **MR. SNYDER:** Let me assess that correctly. This
15:36:51 12 Plaintiff has --

15:36:53 13 **THE COURT:** Is that a fair question?

15:36:54 14 **MR. SNYDER:** Yes, but this Plaintiff has filed in this
15:36:57 15 court a false certification that is demonstratively false. No
15:37:01 16 deposition's required, no more inquiries required to conclude
15:37:07 17 that.

15:37:07 18 **THE COURT:** Well, let me play devil's advocate to tee
15:37:12 19 up Mr. Lake's response. Except for the, I think, Seagate and
15:37:17 20 the home computer in his parents' home, the Plaintiff hasn't in
15:37:24 21 any way shape or form so far actually acquiesced any of these
15:37:28 22 assertions, has he?

15:37:32 23 **MR. SNYDER:** Well, Your Honor, he hasn't acquiesced to
15:37:35 24 a lot of assertions that are mysterious to us, but there's one
15:37:37 25 assertion that is --

15:37:37 1 **THE COURT:** That may be mysterious, but for my
15:37:42 2 purposes of agreeing with you, I have to basically evaluate all
15:37:45 3 of this technical explanation and decide whether it is rounded
15:37:49 4 enough to warrant an inference.

15:37:51 5 And the purpose of a circumstantial evidence case is
15:37:54 6 deciding whether there is a strong likelihood, reasonable
15:38:00 7 likelihood, more likely than not likelihood that he is not in
15:38:04 8 compliance, absent bringing him in here at and assessing his
15:38:09 9 creditability under cross examination, which is the ultimate way
15:38:13 10 that we, in our system, decide whether something is true or not
15:38:17 11 true.

15:38:17 12 **MR. SNYDER:** Well, when something is so true that
15:38:18 13 no --

15:38:18 14 **THE COURT:** With or without expert assistance.

15:38:21 15 **MR. SNYDER:** Your Honor, just days -- this Plaintiff
15:38:24 16 filed is a declaration where he swore under oath pursuant to the
15:38:28 17 penalties of perjury --

15:38:30 18 **THE COURT:** Which document are we talking about?

15:38:30 19 **MR. SNYDER:** This is his July 15th declaration.

15:38:34 20 **THE COURT:** Okay. Just a second. Is it one of your
15:38:50 21 Exhibits?

15:38:50 22 **MR. SNYDER:** Actually, July 17th. This would be
15:38:54 23 document 65. I think I handed that up to Your Honor.

15:39:00 24 **THE COURT:** Document 65, did you say.

15:39:02 25 **MR. SNYDER:** Yes, Your Honor.

15:39:03 1 **THE COURT:** Okay. Very good. Go ahead.

15:39:05 2 **MR. SNYDER:** So he swore under oath that he
15:39:07 3 identified --

15:39:08 4 **THE COURT:** Where is -- what paragraph am I looking
15:39:10 5 at?

15:39:15 6 **MR. SNYDER:** Okay. Yes. On paragraph 13, he falsely
15:39:24 7 swears I have not attempted to conceal or withhold any of my
15:39:30 8 electronically-stored information from the forensic document
15:39:32 9 experts. That was his sworn testimony to Your Honor.

15:39:35 10 In fact, unbeknownst to him, in the USB device, which
15:39:41 11 contained the first and second page of the contract at issue in
15:39:47 12 this case, left a digital fingerprint on his computer and he
15:39:55 13 knowingly the only inference can be knowingly failed to disclose
15:40:01 14 the existence of that remote storage device to this Court and he
15:40:05 15 did not give it to our experts.

15:40:07 16 And the inference is that he did not give it to our
15:40:10 17 experts because it contained evidence that he didn't want us to
15:40:13 18 see. And indeed we know it contained evidence as relevant to
15:40:17 19 this case as anything the first and second page of the contract
15:40:17 20 at issue.

15:40:23 21 And he declared to Your Honor in document number 91
15:40:27 22 filed on July 15th yet again as required by the Court's July 1
15:40:33 23 order, I hereby identify all computers and electronic media in
15:40:38 24 my possession, custody or control, then he lists everything
15:40:42 25 including the Seagate computer and a fails to disclose the

15:40:46 1 remote storage device.

15:40:47 2 **THE COURT:** Well, he wouldn't have it if they're gone
15:40:50 3 or they didn't exist, in his estimation. He wouldn't have them
15:40:53 4 in his possession or control.

15:40:53 5 **MR. SNYDER:** Well, they're two inferences. One, he
15:40:56 6 destroyed them knowingly and willfully. Two, he lost them
15:41:02 7 sometime between accessing them after the commencement of this
15:41:05 8 lawsuit and when he was required by Your Honor to produce them,
15:41:08 9 but failed to disclose to anyone not realizing that in the
15:41:13 10 bowels of one of his computers that there had been an electronic
15:41:17 11 fingerprint that proved the existence of his missing pen drive.

15:41:27 12 And if his pen drive, Your Honor, we could not
15:41:27 13 ascertain what was on it and it was just a missing --

15:41:30 14 **THE COURT:** Pen or pin?

15:41:31 15 **MR. SNYDER:** Pen remote drive. If we did not even
15:41:34 16 know what was on it and all we know was that the Plaintiff had a
15:41:38 17 device that was now gone, we would be concerned enough, but we
15:41:41 18 know that this device stored page one and two of a contract that
15:41:45 19 he calls the Facebook contract.

15:41:49 20 And we believe that is the instrument of the fraud.
15:41:52 21 We believe that is where a version of this contract exists,
15:41:55 22 which will provide additional evidence, additional evidence of
15:41:59 23 the fraud that's at the heart of this case.

15:42:02 24 And so --

15:42:03 25 **THE COURT:** Additional evidence?

15:42:04 1 **MR. SNYDER:** Additional evidence, yes.

15:42:06 2 **THE COURT:** How so?

15:42:07 3 **MR. SNYDER:** We don't have it. We -- our experts
15:42:10 4 are --

15:42:10 5 **THE COURT:** How do you know there's additional
15:42:12 6 evidence then?

15:42:13 7 **MR. SNYDER:** I think that given its willful either
15:42:18 8 destruction or withholding, that is a inference which the second
15:42:23 9 circuit permits under these circumstances given the extreme
15:42:29 10 prejudice to us by disappearance. At a minnimum --

15:42:30 11 **THE COURT:** But if Mr. Lake stands up and says Your,
15:42:33 12 Honor, I talked to my client and he's happy to give us a
15:42:36 13 supplemental affidavit that explains it, he's forgotten about
15:42:40 14 these drives and since he may have used them, they're not lost,
15:42:45 15 not in his possession, which he regrets, sorry, then he hasn't
15:42:50 16 concealed anything, nor has he withheld anything.

15:42:52 17 **MR. SNYDER:** Well, he has concealed and probably
15:42:56 18 destroyed. He could be swearing falsely again to the Court and
15:42:59 19 I would respectfully submit that a future date --

15:42:59 20 **THE COURT:** He could --

15:43:00 21 **MR. SNYDER:** At a future date we will address that.

15:43:03 22 **THE COURT:** All right.

15:43:04 23 **MR. SNYDER:** And this Plaintiff comes to the Court
15:43:06 24 with unclean hands and those kinds of certifications, I think,
15:43:11 25 should be give very little weight.

15:43:13 1 **THE COURT:** Let's hear from Mr. Lake. I want to hear
15:43:17 2 from his side before I can make a ruling. Thank you.

15:43:20 3 **MR. LAKE:** Thank you, Your Honor. I'm going to
15:43:23 4 address the points as they were presented, if that's okay.

15:43:27 5 First, there was a discussion about the Seagate
15:43:30 6 computer and an allegation that it was not produced on July 15th
15:43:36 7 as required by the order. That's not true. It was actually
15:43:39 8 produced in Sarasota, the actual loose hard drive of the Seagate
15:43:44 9 computer.

15:43:44 10 What was not produced on the 15th was a forensic image
15:43:48 11 of that identical hard drive. And I was made aware of that on
15:43:53 12 the 16th by Mr. Southwell. We had hired a lawyer to attend with
15:43:58 13 the experts. They were all there in Chicago. I couldn't be
15:43:58 14 there. I was in Buffalo.

15:44:03 15 At the end of the day, for some reason, I don't know
15:44:04 16 what, they hadn't made an image of it. Mr. Southwell notified
15:44:08 17 me, I notified them that produce it. It was Friday and on
15:44:12 18 Monday they hadn't produced all of their of images anyway.

15:44:15 19 We confirmed that they had found it and we produced it
15:44:18 20 immediately and I wrote Mr. Southwell a letter and apologized
15:44:22 21 for that. And they not only had the hard drive itself, but they
15:44:25 22 also got the image. So they had that on the 15th.

15:44:29 23 The other one was the issue over his parents'
15:44:32 24 computer. And we had a long debate back at the end of June
15:44:35 25 about what computers needed to be produced.

15:44:39 1 If you recall, we sat around for over two hours. Paul
15:44:44 2 Ceglia was going to have to search the entire world to find any
15:44:47 3 computer had he had ever touched.

15:44:50 4 And it was conceded that that was impractical and
15:44:55 5 probably impossible result. And as a result, he would only have
15:44:56 6 to supply the computers that were within his possession, custody
15:44:59 7 and control.

15:45:00 8 There was the issue of one computer at his parents'
15:45:04 9 house that was referenced in a Wellsville newspaper last year
15:45:09 10 that might have had some information on it. We asked for those
15:45:10 11 computers and we produced that on the 15th.

15:45:13 12 Then out of an abundance of caution and a diligent
15:45:18 13 search of all electronically-stored information that we could
15:45:21 14 find to comply with the order, we asked Mr. Ceglia, Paul's dad,
15:45:28 15 Carmen, if there were any other computers that may have been
15:45:32 16 accessed by Paul Ceglia, his son. He said he didn't think so,
15:45:37 17 but that he had one more computer, that was his personal
15:45:40 18 computer.

15:45:40 19 Out of an abundance of caution, I notified
15:45:43 20 Mr. Benjamin and said we have another computer. We don't think
15:45:48 21 that it needs to be produced. We don't think it was in
15:45:51 22 Mr. Ceglia's custody, possession or control, but you know what,
15:45:54 23 if you want it, you can have it. Do you want it. He said yes
15:45:57 24 and so we said fine. Have your guy or gal come up and make an
15:46:01 25 image of it. So we brought it up the next day, they did.

15:46:04 1 **THE COURT:** They did not?

15:46:05 2 **MR. LAKE:** No, they did.

15:46:06 3 **THE COURT:** They did.

15:46:07 4 **MR. LAKE:** Yeah. We produced -- those are the
15:46:11 5 computers they're talking about and that was the first line of
15:46:14 6 their argument that why they didn't need to produce the emails.

15:46:18 7 Next, they talk about the USB devices and the
15:46:21 8 certifications that go along with that. And this has been a
15:46:24 9 issue that we have been debating now for many weeks. And asking
15:46:34 10 me to produce those USB devices would be like asking me to
15:46:34 11 produce a unicorn or leprechaun. They don't exist.

15:46:35 12 I've asked and I've asked and I have asked again. I
15:46:38 13 have searched everywhere that is practicable for me to look and
15:46:42 14 I cannot produce them because I can't find them. And I have
15:46:47 15 been told by everyone I've asked they don't have them.

15:46:51 16 **THE COURT:** Can I ask you two quick questions? Take a
15:46:54 17 pause. Number one, you've heard the Defendants' arguments as to
15:46:58 18 why they believe, regardless of what you just said, why at some
15:47:03 19 point in time they did exist.

15:47:05 20 **MR. LAKE:** Yeah, they did find --

15:47:05 21 **THE COURT:** And the relevance -- excuse me. Do you
15:47:09 22 correlate with their technical analysis as to the basis of their
15:47:13 23 belief that these devices at some time, the so-called pen
15:47:18 24 drives, existed?

15:47:19 25 **MR. LAKE:** There were actually six that were

15:47:21 1 referenced --

15:47:21 2 **THE COURT:** Because if I hold you just for one more
15:47:24 3 second before you respond, based on what I heard you just say, I
15:47:28 4 don't think it would be unfair if I were to conclude that you
15:47:33 5 concede that at one point they did exist.

15:47:34 6 **MR. LAKE:** Oh, no. They absolutely did exist.

15:47:37 7 **THE COURT:** And when did they exist.

15:47:38 8 **MR. LAKE:** Well, we know that they existed by virtue
15:47:42 9 of a report that shows that they were inserted into a computer,
15:47:47 10 now what we don't know is whose they are.

15:47:50 11 **THE COURT:** Well, how would you characterize on behalf
15:47:52 12 of your client the date of their approximate existence and the
15:47:57 13 date of their approximate nonexistence? Is that a fair way to
15:48:00 14 put that?

15:48:01 15 **MR. LAKE:** Yeah, there's a report and they have it and
15:48:03 16 that's what Mr. Snyder is referring to.

15:48:06 17 **THE COURT:** What do you say as to the timeframe that
15:48:09 18 these USB storage devices existed?

15:48:13 19 **MR. LAKE:** I'm conceding that of the six devices that
15:48:16 20 are referred to, one was produced, according to the reports that
15:48:21 21 I'm reading, the same one they got, that at some point there
15:48:27 22 were USB devices that were inserted into a computer and so as
15:48:33 23 of --

15:48:33 24 **THE COURT:** When approximately are those dates, the
15:48:40 25 timeframe?

15:48:41 1 **MR. LAKE:** I'm trying to see if I can tell the dates
15:48:43 2 that they were.

15:48:44 3 **THE COURT:** Mr. Snyder would like to attempt to assist
15:48:49 4 you.

15:48:49 5 **MR. LAKE:** I think the experts will tell you and when
15:48:52 6 he brings his motion when they were last --

15:48:56 7 **THE COURT:** No, tell me when they first existed.

15:48:59 8 **MR. LAKE:** That I don't know and I don't think you can
15:49:01 9 tell. I think all you can tell --

15:49:03 10 **THE COURT:** Why is that?

15:49:03 11 **MR. LAKE:** Well, I think the only thing we have is a
15:49:06 12 -- he's correct. When you take a thumb drive, the little device
15:49:09 13 he showed you, and you put it into the computer, the computer
15:49:13 14 reads it and says what the device is.

15:49:16 15 **THE COURT:** So do you have a record of doing so?

15:49:17 16 **MR. LAKE:** Yes. And that's what he's referring to.

15:49:20 17 **THE COURT:** Would not that record indicate when it was
15:49:23 18 inserted?

15:49:24 19 **MR. LAKE:** Yes.

15:49:25 20 **THE COURT:** When is the earliest date that one of
15:49:28 21 these drives was inserted?

15:49:30 22 **MR. LAKE:** No, the experts would have to tell you that
15:49:33 23 because we'd have to pull the report and read it. They may have
15:49:36 24 that.

15:49:37 25 **MR. SNYDER:** Presumably, the Plaintiff would know.

15:49:40 1 **THE COURT:** Well, I'm just asking what the record
15:49:42 2 shows what we have in front of us. I'm going to ask another
15:49:46 3 question, Mr. Snyder. Bear with me.

15:49:47 4 I just want to know, you have all of this technical
15:49:51 5 assistance and a lot of money for it and you're telling me that
15:49:54 6 while you know the drive was inserted, you can't tell me when it
15:49:57 7 was first inserted on the computer?

15:49:59 8 **MR. LAKE:** The experts could run a report on that and
15:50:03 9 they could probably tell you that. I don't have that report
15:50:03 10 with me.

15:50:03 11 Their experts may have done that and they may be able
15:50:07 12 to produce the report. I'm not denying the existence because I
15:50:10 13 saw the report that said that --

15:50:11 14 **THE COURT:** Would the Court fairly conclude that they
15:50:14 15 existed and were inserted in the computer in the 2003 and 2004
15:50:20 16 timeframe?

15:50:21 17 **MR. LAKE:** That I don't know.

15:50:23 18 **THE COURT:** How about the 2005, 2006 timeframe?

15:50:26 19 **MR. LAKE:** Again, Your Honor, I don't know.

15:50:28 20 **THE COURT:** Well, apparently they were inserted
15:50:31 21 sometime before today.

15:50:33 22 **MR. LAKE:** Yes.

15:50:33 23 **THE COURT:** Otherwise, they wouldn't be the subject of
15:50:37 24 this report.

15:50:37 25 **MR. LAKE:** Right.

15:50:38 1 **THE COURT:** So should the Court fairly conclude for
15:50:42 2 the sake of asking the next question provide a foundation that
15:50:47 3 they existed and were inserted in the computer, say, within the
15:50:51 4 last five years?

15:51:00 5 **MR. LAKE:** I think the one that they're -- I don't
15:51:01 6 know, but I think the one that -- well, I'm looking at a report.

15:51:04 7 **THE COURT:** You know what my next question is going
15:51:06 8 be. I'm not trying to beat a dead horse.

15:51:06 9 **MR. LAKE:** The question is --

15:51:07 10 **THE COURT:** My next question obviously is did you ask
15:51:10 11 your client the question.

15:51:11 12 **MR. LAKE:** Yes, of course I did.

15:51:12 13 **THE COURT:** And what did he say?

15:51:13 14 **MR. LAKE:** He said -- I asked him even specifically by
15:51:17 15 name because we had a list of the names.

15:51:17 16 **THE COURT:** What did he say?

15:51:20 17 **MR. LAKE:** He said I do not have them. I cannot
15:51:23 18 produce them.

15:51:24 19 **THE COURT:** Did you ask him when they were used.

15:51:27 20 **MR. LAKE:** I didn't know -- well, I asked him if he
15:51:31 21 had them, but I didn't know where they were used.

15:51:33 22 **THE COURT:** Did you next him the next obvious question
15:51:35 23 which is --

15:51:36 24 **MR. LAKE:** Where are they?

15:51:38 25 **THE COURT:** -- what happened to them?

15:51:39 1 **MR. LAKE:** Yes, I did.

15:51:40 2 **THE COURT:** And what was his answer?

15:51:42 3 **MR. LAKE:** His answer was I lost them, I misplaced
15:51:51 4 them.

15:51:51 5 **THE COURT:** Those were his words?

15:51:51 6 **MR. LAKE:** I'll have to give you a declaration. I'm
15:51:51 7 paraphrasing what I recall from my conversation, but I had a
15:51:51 8 direct conversation with him.

15:51:51 9 The other thing that --

15:51:53 10 **THE COURT:** While he's in Ireland?

15:51:55 11 **MR. LAKE:** Correct. The other thing he said is that
15:51:59 12 he wanted to know what computers the thumb drives were put in
15:52:04 13 because they may not have been his and so I said that's a fair
15:52:10 14 question.

15:52:10 15 Because if somebody had access to the computers that
15:52:14 16 we turned over, for example his father's, which was not Paul's,
15:52:20 17 that he didn't use, but we turned it over anyway, if his father
15:52:22 18 would have put a thumb drive in that computer, it wouldn't be
15:52:23 19 within Paul Ceglia's possession, custody or control anyway.

15:52:27 20 So we went a step further and asked of his parents if
15:52:30 21 they had a thumb drive that they may have used. Paul Ceglia
15:52:34 22 told me that if other people used his computer while he wasn't
15:52:37 23 there and they had it --

15:52:38 24 **THE COURT:** Sounds to me that from everything
15:52:43 25 Mr. Snyder has said, that we're not talking about the parents'

15:52:43 1 computer.

15:52:43 2 **MR. LAKE:** No, they're.

15:52:44 3 **THE COURT:** The analysis of the experts points to
15:52:47 4 computers that were used by Mr. Ceglia at the residence, is that
15:52:52 5 correct.

15:52:52 6 **MR. SNYDER:** Yes, Your Honor. And indeed --

15:52:54 7 **THE COURT:** So why would you need to ask that
15:52:57 8 question?

15:52:57 9 **MR. LAKE:** Because while I followed up with the
15:52:59 10 question that -- the obvious question to ask is where are they,
15:53:03 11 where would they be, give them to me, I need to produce them --

15:53:07 12 By the way, and I think it's a good time to point this
15:53:11 13 out, the whole thing is they're implying that we're somehow
15:53:13 14 withholding evidence that could be important to their case and
15:53:16 15 that we have thrown the pen drive into Lake Erie. And I think
15:53:21 16 we have to add that'd be a long toss from Hornell to Lake Erie.

15:53:27 17 So here's why I think this whole line of accusation to
15:53:34 18 me is unfounded and it's frankly offensive. Because if he was
15:53:39 19 going to throw anything into Lake Erie, do you have it think it
15:53:42 20 would have been the pen drive or do you think it would have been
15:53:45 21 the computer?

15:53:46 22 **THE COURT:** I have no idea whether spoliation has
15:53:49 23 occurred, but I'm trying to find out whether there is a failure
15:53:54 24 to identify and a failure to produce.

15:53:55 25 If you're telling me, as I think you are, and if I'm

15:53:59 1 not hearing correctly, this is the time to tell me and
15:54:02 2 straighten me out, that Mr. Ceglia concedes that there were
15:54:06 3 drives connected to his computers upon which documents that were
15:54:14 4 created in relationship to this lawsuit existed or were
15:54:20 5 produced, that arguably his declaration was incomplete insofar
15:54:25 6 as it failed to identify the prior existence of such devices,
15:54:31 7 storage devices.

15:54:33 8 **MR. LAKE:** I will clarify. You're right that there
15:54:36 9 were pen drives, but they were identified. And they were
15:54:39 10 identified -- and this is where I think there's been some
15:54:43 11 difference in interpretation of the order because this whole
15:54:48 12 issue of what is supposed to be identified and what is not, the
15:54:54 13 Stroz report that you've seen a copy of identifies everything
15:54:58 14 that was produced and it does identify it in very great details.
15:55:03 15 All I can identify is what I have.

15:55:05 16 And the only things that are relevant to our
15:55:10 17 discussion today is the document and whether or not it was
15:55:15 18 authentic and that has to do with the forensic testing and the
15:55:18 19 electronically-stored information.

15:55:19 20 And so what we did was he asked for all of it over and
15:55:23 21 over again. We produced it all. Than ran their search and we
15:55:26 22 made a detailed report identifying everything that was on the
15:55:29 23 computer.

15:55:30 24 **THE COURT:** I need to get calibrated here. I know
15:55:33 25 that those documents are items listed in the report of your

15:55:40 1 expert, I just need to see it. What should I look at to see
15:55:46 2 that to track Mr. Lake's statement?

15:55:50 3 **MR. LAKE:** It's the big Excel spreadsheet.

15:55:56 4 **MR. SNYDER:** It's Exhibit I to the Southwell
15:56:00 5 declaration, which is --

15:56:07 6 **MR. LAKE:** It's lists 120 items that were produced.

15:56:13 7 **THE COURT:** I'm looking for the expert statement of
15:56:16 8 the things that were identified by Mr. Ceglia.

15:56:19 9 **MR. SNYDER:** Yes, if I can approach, Your Honor.

15:56:23 10 **THE COURT:** That's not what you're referring to,
15:56:26 11 right, Mr. Lake?

15:56:26 12 **MR. LAKE:** No, I'm referring to the Stroz Friedberg
15:56:30 13 report.

15:56:30 14 **THE COURT:** Somewhere there is an expert statement
15:56:33 15 about what he expects to be produced per the order.

15:56:37 16 **MR. SNYDER:** Yes, it's Plaintiff's privilege log and
15:56:41 17 it contains.

15:56:42 18 **THE COURT:** No, it's in the expert's declaration.

15:56:46 19 **MR. SNYDER:** May, I approach Your Honor?

15:56:48 20 **MR. LAKE:** Are you referring to the John Evans
15:57:01 21 declaration?

15:57:02 22 **THE COURT:** I think so. Is that what you're referring
15:57:05 23 to?

15:57:06 24 **MR. LAKE:** No. Mr. Snyder is, I think, arguing that I
15:57:09 25 didn't identify things that were produced or should have been

15:57:12 1 produced.

15:57:13 2 **THE COURT:** Isn't there an expert declaration which
15:57:17 3 states in a series of items what's to be turned over from the
15:57:23 4 Plaintiff?

15:57:23 5 **MR. LAKE:** No, there's an order. We have an order.

15:57:28 6 **MR. SNYDER:** Your Honor, may I approach?

15:57:32 7 **THE COURT:** I'm recalling something very specific
15:57:34 8 here.

15:57:34 9 **MR. SNYDER:** It is document 61 which is the
15:57:39 10 declaration of John Evans' support of Plaintiff's opposition.

15:58:01 11 **THE COURT:** I am trying to correlate your statement to
15:58:01 12 what Mr. Evans said that alleged the custody from Mr. Ceglia and
15:58:05 13 has in possession certain hardware, 169 floppy discs, 1075 CDs,
15:58:12 14 one laptop computer. Also in his possession is an image of a
15:58:13 15 second hard drive and so forth.

15:58:15 16 **MR. LAKE:** Right, we produced all that.

15:58:27 17 **THE COURT:** Okay.

15:58:27 18 **MR. LAKE:** And they're not claiming that we didn't.

15:58:27 19 **THE COURT:** Okay. Now, what you're referring to is
15:58:27 20 Plaintiff Ceglia's completeness of his declaration?

15:58:29 21 **MR. LAKE:** Right.

15:58:29 22 **THE COURT:** This is referenced by looking at something
15:58:33 23 else?

15:58:34 24 **MR. LAKE:** Yes. What they're --

15:58:35 25 **THE COURT:** And what it is that I should look at

15:58:38 1 there?

15:58:38 2 **MR. LAKE:** That would be the report that was
15:58:44 3 originally drafted by Stroz that we turned into the privilege
15:58:47 4 and confidential log. That lists 120 items that were produced.

15:58:53 5 And see, the trouble is --

15:58:53 6 **THE COURT:** What I'm trying to understand is if
15:58:56 7 Mr. Ceglia's conceded to you that there were these six or so
15:59:01 8 drives that he used in connection with -- I don't know how to
15:59:06 9 phrase it. Producing documents which have --

15:59:11 10 **MR. LAKE:** No. What is known to me is what was
15:59:16 11 discovered by Stroz because I read the Stroz report and it lists
15:59:22 12 several external hard drives, thumb drives, pen drives, whatever
15:59:22 13 you want.

15:59:28 14 We had asked Mr. Ceglia and his family to produce all
15:59:35 15 of the electronically-stored information they he had. They
15:59:39 16 produced a thumb drive, it was a Maxtor 3200 USB device,
15:59:42 17 laptops, computers, loose hard drives, floppy discs, CDs.

15:59:45 18 We asked them to compile everything and give them to
15:59:48 19 us. They did. We produced them to Stroz, who then did their
15:59:53 20 search, came up with the report and we produced that timely as
15:59:57 21 we were supposed to.

15:59:57 22 In that report, there were items referenced, including
16:00:00 23 one pen drive. They're calling it a pen drive because that's
16:00:04 24 what it's referred to, but it's a USB device. That made
16:00:06 25 reference to a file called Facebook that supposedly contained

16:00:12 1 TIFF scan 001 and scan TIFF 002. Presumably those are the --

16:00:15 2 **THE COURT:** Did those references come off of the
16:00:18 3 parents' computers?

16:00:23 4 **MR. LAKE:** No.

16:00:24 5 **THE COURT:** Just one at a time.

16:00:25 6 **MR. SNYDER:** No, it was not off the parents'
16:00:27 7 computers. It was off one of the computers, I don't know which
16:00:30 8 one offhand because we don't have the expert's final report.

16:00:34 9 One of the Plaintiff's computers had a electronic
16:00:37 10 fingerprint that told us the computer transferred onto a pen
16:00:41 11 device, a storage device, removable storage device, Zuckerberg
16:00:49 12 contract page one dot TIFF, Zuckerberg contract page two dot
16:00:49 13 TIFF. Those pen drives were not produced to us, not identified
16:00:53 14 by the Plaintiff.

16:00:53 15 **THE COURT:** So you can see what my question is. Maybe
16:00:55 16 I'm not articulating it well enough, but based on what we just
16:01:00 17 heard and what I thought I was hearing over the past hour, these
16:01:03 18 pen drives don't associate with the parents' computer, they
16:01:07 19 associate with the computer that Mr. Ceglia has used. And
16:01:10 20 apparently, according to their expert analysis, used in
16:01:14 21 connection with I'll call it issues associated with this
16:01:19 22 lawsuit.

16:01:19 23 **MR. LAKE:** I don't know that. All I know --

16:01:21 24 **THE COURT:** Well, you do know it because you just
16:01:23 25 heard it and it's in the expert report, which maybe you haven't

16:01:27 1 had the benefit of seeing that.

16:01:29 2 **MR. LAKE:** I have not seen the expert reports.

16:01:32 3 **THE COURT:** But you can see the Court's view here is
16:01:36 4 that I'm eleven age carefully to this and it sounds to me like
16:01:40 5 the Plaintiff is agreeing that such drives were connected to his
16:01:44 6 computer, which corroborates, I think, if I can use that term
16:01:50 7 with what the expert found.

16:01:52 8 And for the Plaintiff not to have in the certification
16:01:55 9 recall that such drives existed at some point in time, but have
16:02:00 10 since been lost or mislaid strikes me as withholding relevant
16:02:07 11 information. Do you agree with that?

16:02:09 12 **MR. LAKE:** No, I don't.

16:02:09 13 **THE COURT:** Why not?

16:02:10 14 **MR. LAKE:** Because we produced everything we had in a
16:02:13 15 different form.

16:02:14 16 **THE COURT:** You, we, but not the Plaintiff.

16:02:16 17 **MR. LAKE:** Well, no, the Plaintiff certified --

16:02:18 18 **THE COURT:** You may have certified, but it sounds to
16:02:21 19 me that the Plaintiff is agreeing that he didn't. He couldn't
16:02:23 20 produce, according to what you just told us, because he doesn't
16:02:26 21 have it, but he didn't even identify it because he forgot about
16:02:30 22 it.

16:02:30 23 **MR. LAKE:** No, he -- well, I don't know. All I know
16:02:33 24 is that --

16:02:33 25 **THE COURT:** He obviously didn't forget about it

16:02:36 1 because he acknowledged to you that he had lost or mislaid them
16:02:40 2 when you confronted him with the oversight.

16:02:43 3 **MR. LAKE:** I asked him.

16:02:43 4 **THE COURT:** Right, exactly the point.

16:02:45 5 **MR. LAKE:** At the time of the --

16:02:46 6 **THE COURT:** So how can it be said that he forgot about
16:02:49 7 it?

16:02:49 8 **MR. LAKE:** Because the certification was due on July
16:02:52 9 15th, that was according to the order. On July 15th we turned
16:02:56 10 over all the information to Stroz Friedberg, all of it, and we
16:02:59 11 have not had an opportunity to review it because we were
16:03:02 12 precluded from reviewing it because we had to give it over to
16:03:06 13 Stroz Friedberg, which we did. And we submitted our
16:03:08 14 certification because I asked everybody what it was.

16:03:11 15 Then two weeks later, we get back what they found and
16:03:13 16 we find that there's things that we didn't include and so the
16:03:17 17 certification at the time that it was made is completely
16:03:20 18 accurate. Now, the question --

16:03:21 19 **THE COURT:** It's not complete.

16:03:23 20 **MR. LAKE:** Well, no, because the order, the way that
16:03:25 21 we understood it, was --

16:03:26 22 **THE COURT:** Let's put it this way, if he had
16:03:28 23 remembered at the time that he made the certification that the
16:03:32 24 six drives existed and that he used them in connection with his
16:03:35 25 computer, would he have been obliged to disclose that in his

16:03:40 1 certification?

16:03:40 2 **MR. LAKE:** I'm not sure. I think if he did, he would
16:03:52 3 have told me because I asked him that specific question.

16:03:52 4 If what you're getting to is that now that Stroz
16:03:52 5 Friedberg's identified these six drives, one was produced, if
16:03:53 6 you want a certification from Mr. Ceglia that says this is mine
16:03:57 7 or it isn't or I don't know what this one is or I did use that
16:03:59 8 or I didn't use that, I don't think that's difficult to get.
16:04:03 9 That's easy to get.

16:04:04 10 I don't think it's helpful because what I know is that
16:04:07 11 whether he certifies it or not and whether or not we have one
16:04:11 12 more declaration from the Plaintiff or the Defendant about
16:04:14 13 whether or not they -- that he ever committed perjury, backdated
16:04:17 14 or manipulated documents or had done anything that was unethical
16:04:21 15 or questions their veracity, I think we are going to have an
16:04:27 16 entire stack on both sides that are going to probably balance
16:04:30 17 out.

16:04:31 18 **THE COURT:** I'm looking at the stack that I have in
16:04:33 19 front of me.

16:04:34 20 **MR. LAKE:** Well, that's because we haven't started our
16:04:37 21 discovery yet.

16:04:37 22 **THE COURT:** I understand that. I am just trying to
16:04:40 23 grasp how the Plaintiff could now recall that there were such
16:04:43 24 drives.

16:04:44 25 On the one hand -- and they were used on this computer

16:04:46 1 apparently, but in the same breath recall, but only in response
16:04:50 2 to your question, that had he had since been, quote, mislaid or
16:04:54 3 lost.

16:04:55 4 **MR. LAKE:** Right.

16:04:56 5 **THE COURT:** How would he know?

16:04:57 6 **MR. LAKE:** Because I pointed them out to him and said
16:04:57 7 Stroz Friedberg --

16:04:59 8 **THE COURT:** How would he know they were mislaid or
16:05:02 9 lost if he did not disclose them in the first place?

16:05:03 10 **MR. LAKE:** Because I asked him to search for anything.
16:05:06 11 He didn't produce them. I recognize them as a result of the
16:05:06 12 Stroz report. I said that.

16:05:10 13 **THE COURT:** When you asked him if he mislaid them, did
16:05:13 14 you ask him if he had searched for them?

16:05:13 15 **MR. LAKE:** Yes, and he said I searched for them the
16:05:28 16 first time you asked me. Here is what happened: We had an
16:05:29 17 order on July 1st. We were to produce all of the information
16:05:32 18 that we discussed. I asked for the information. What I was
16:05:37 19 given, I produced.

16:05:39 20 Stroz Friedberg then generated a report. When I got
16:05:42 21 the report, I noticed and was made aware by the Defendants via
16:05:48 22 letter and/or an email, I don't know which, that there were
16:05:52 23 items that were not produced, specifically the USB drives.

16:05:55 24 I then went back to Mr. Ceglia and said I know I asked
16:05:59 25 you to produce everything, you told me you didn't have it.

16:06:02 1 There are some specifics now that have been brought out. Do you
16:06:07 2 recall what these are and can you produce them, and he said
16:06:12 3 Jeff, I gave you everything I had and why are you asking me to
16:06:15 4 produce something I don't have. And I said because I've been
16:06:19 5 asked to follow up. We want to be in compliance with the order.
16:06:23 6 Do you have anything else for me.

16:06:24 7 **THE COURT:** Okay.

16:06:25 8 **MR. LAKE:** No, I do not. And that's where we are.

16:06:28 9 **THE COURT:** Okay.

16:06:28 10 **MR. LAKE:** That's why I think a certification is
16:06:31 11 accurate.

16:06:32 12 **THE COURT:** Okay.

16:06:32 13 **MR. LAKE:** So that's what happened with the USB
16:06:35 14 drives.

16:06:35 15 **THE COURT:** Can we move onto the other categories?

16:06:39 16 **MR. LAKE:** So that's the USB. Number two was no
16:06:41 17 native electronic emails.

16:06:45 18 **THE COURT:** Electronic version of the purported
16:06:48 19 contracts.

16:06:48 20 **MR. LAKE:** Oh, you want to do that one first? Okay.
16:06:48 21 The native contract, what they're talking about is when Stroz
16:06:57 22 did their search, they found on certain devices, whether it was
16:07:00 23 a hard drive, a CD or a floppy drive, several drafts of the
16:07:06 24 work-for-hire contract, the contract that was attached to the
16:07:10 25 complaint, the contract that we contend as a authentic contract

16:07:15 1 as opposed to the StreetFax contract, which we contend was not
16:07:20 2 the authentic contract.

16:07:20 3 They asked us for any soft or native electronic
16:07:24 4 versions of that contract. We said sure. And so in our search,
16:07:30 5 we asked for the all the computers that could have been used and
16:07:33 6 any storage devices that might have had that on it and we
16:07:37 7 produced them.

16:07:38 8 Now, the Defendants are upset that although they claim
16:07:42 9 there are seven drafts, none of those drafts are identical
16:07:48 10 verbatim to the work-for-hire contract that was produced. And
16:07:52 11 they want to know -- I think what they're asking us where is
16:07:55 12 that.

16:07:55 13 And my answer would be the same and that is I gave you
16:07:59 14 everything we had. Whether or not it's the final version or
16:08:02 15 draft one, two, three, four, five, six, seven, I don't know. I
16:08:06 16 have -- I have no other means to search for it.

16:08:10 17 We have provided all the computers and all the discs
16:08:13 18 that were associated with them, other than the ones that we just
16:08:17 19 discussed. And all they have are -- if it's a draft, it's a
16:08:22 20 draft.

16:08:22 21 If it existed at some point in time, which certainly
16:08:26 22 it did because there was a original of it made, that at this
16:08:34 23 point does not exist. What does exist are the drafts and the
16:08:40 24 drafts can be analyzed. They can be --

16:08:43 25 **THE COURT:** They should be there, but they're not

16:08:45 1 there?

16:08:46 2 **MR. LAKE:** No, they are. They have them. We produced
16:08:49 3 them.

16:08:49 4 **THE COURT:** No, no. The seven drafts that you say you
16:08:52 5 don't have.

16:08:53 6 **MR. LAKE:** No, we do have and they were produced.

16:08:56 7 **THE COURT:** Oh, they were produced so the Defendants
16:08:57 8 are incorrect in saying that they weren't?

16:09:00 9 **MR. LAKE:** No, what they think is the final version of
16:09:03 10 the work-for-hire contract, that was signed by Mark Zuckerberg
16:09:20 11 and Paul Ceglia that looks like this, I think what they're
16:09:20 12 saying is they haven't found one that's exactly in this form.
16:09:20 13 That the versions that we produced are not identical to this.
16:09:22 14 They are similar. They are soft copy electronic versions.

16:09:28 15 **THE COURT:** Well, shouldn't there be one?

16:09:30 16 **MR. LAKE:** If there was one, I would have produced it.
16:09:33 17 I produced everything that I found, whether it would be draft
16:09:37 18 one or draft seven, I gave over the computers and the discs and
16:09:40 19 everything.

16:09:40 20 **THE COURT:** If they're not lodged there, then somehow
16:09:44 21 it got lost or should there have been one in your estimation?

16:09:47 22 **MR. LAKE:** Well, there had to have been one so it
16:09:50 23 could have been printed and signed.

16:09:51 24 **THE COURT:** That's the point that I'm interested in.
16:09:52 25 What conceivably could have happened to it?

16:09:54 1 **MR. LAKE:** I don't know. In 2003 it could have been
16:09:57 2 deleted. It could have been -- and I think this is what
16:09:59 3 Mr. Snyder's point is that he thinks it was actually stored on
16:10:04 4 the thumb drive and the thumb drive is missing. I think that's
16:10:08 5 the argument he was making.

16:10:10 6 My point is this: We turned over everything. There
16:10:13 7 were many, many drafts and if they want to argue later that
16:10:17 8 those drafts are not the original contract, that is something
16:10:19 9 that is not before us today.

16:10:21 10 What's before us today is whether or not I adequately
16:10:25 11 complied with the order. And I'm submitting that I did because
16:10:28 12 I produced all of the computers that have all of the soft copies
16:10:32 13 of all of the documents that were at issue with the expedited
16:10:35 14 discovery order.

16:10:35 15 **THE COURT:** Is that true, in the interest of time, of
16:10:37 16 the other areas of request, all electronic copies --

16:10:40 17 **MR. LAKE:** The emails -- the point about the emails
16:10:44 18 and there is actually --

16:10:45 19 **THE COURT:** No, no. About the ones in possession of
16:10:47 20 his attorneys or his experts Mr. Osborn or Ms. Aginsky.

16:10:53 21 **MR. LAKE:** Yeah, they were produced. They were as
16:10:55 22 item 5 and item 8.

16:11:01 23 **MR. SNYDER:** That's just wrong, Your Honor.

16:11:04 24 **MR. LAKE:** No. How could he know what's in the
16:11:06 25 possession Mr. Ceglia's attorneys? I mean, if he can explain

16:11:11 1 that, then maybe he could explain why I'm wrong.

16:11:14 2 **THE COURT:** Repeat what you just said.

16:11:15 3 **MR. LAKE:** He's somehow saying that he knows what's in
16:11:19 4 the possession of Mr. Ceglia's attorneys. I want to know how he
16:11:23 5 knows that.

16:11:24 6 **THE COURT:** We'll find out. You're saying those were
16:11:25 7 produced. Those are items 5 and 8 on the so-called privileged
16:11:31 8 log. What about the webmail accounts?

16:11:32 9 **MR. LAKE:** Okay. The webmail accounts are beyond the
16:11:34 10 scope of the order because the order asked for two things, to
16:11:36 11 produce the original contract for forensic testing for
16:11:41 12 authenticity and information relating to the emails that were
16:11:43 13 attached to the first amended complaint.

16:11:45 14 It did not ask for, nor were we required to produce,
16:11:50 15 every email account and everything on every email account that
16:11:53 16 may have been in existence.

16:11:56 17 So the reason -- and Mr. Snyder's submitted this as a
16:12:00 18 new request. This is not anything that was contemplated at the
16:12:04 19 time of the July 1st order.

16:12:06 20 They have subsequently found that Mr. Ceglia had
16:12:08 21 different email accounts and now they want them, the same way
16:12:12 22 that we want every one of Mr. Zuckerberg's emails and every one
16:12:17 23 of Mr. Zuckerberg's computers and every bit of code that was
16:12:18 24 written by Mr. Zuckerberg for Mr. Ceglia and every bit of code
16:12:23 25 that was utilized to launch Facebook in 2004 and we'll be able

16:12:28 1 to answer the same questions.

16:12:29 2 But that was not what was contemplated in the
16:12:33 3 discovery order so that's why that wasn't produced. This is a
16:12:37 4 new request and we can address it when they produce all the
16:12:41 5 things that I just asked for. We can consider that on a
16:12:45 6 separate date.

16:12:49 7 Next is the native electronic emails and we have
16:12:52 8 already submitted by Paul Ceglia an opposition to the motion for
16:12:57 9 expedited discovery that there are no native electronic emails
16:13:06 10 in his custody, possession and control regarding the email chain
16:13:10 11 between him and Mark Zuckerberg at the end of 2003 through the
16:13:14 12 end of July of 2004 because it was a Microsoft Outlook ISP
16:13:20 13 account that he didn't have access to and it was his custom and
16:13:25 14 practice, as was in 2003 of '04, that the way it worked was that
16:13:29 15 in order for him to save his emails, he would copy them, put
16:13:34 16 them on a Word document and then make a report, which we did
16:13:34 17 supply.

16:13:40 18 They are no other native electronic emails because
16:13:43 19 they were, as I mentioned and has already been declared,
16:13:47 20 converted into a word document and saved on discs and those
16:13:50 21 discs were produced. So I can't produce the native electronic
16:13:55 22 emails.

16:13:56 23 **THE COURT:** Why would it be that there would be no
16:13:59 24 electronic form of those emails?

16:14:01 25 **MR. LAKE:** The way I understand it, and this was

16:14:04 1 discussed before I became involved in the case, but reading the
16:14:09 2 declaration and talking with our computer expert, that in order
16:14:13 3 to save those emails, you would have to essentially copy them
16:14:16 4 and paste them onto a different document and save them. That's
16:14:20 5 what he did and we already got that declaration so I can't
16:14:24 6 produce those.

16:14:25 7 And as far as identifying what they are, they've been
16:14:30 8 identified again in our log that was produced. And then, I
16:14:37 9 think --

16:14:53 10 **THE COURT:** What timeframe are we referring to with
16:14:56 11 regard to those emails that you say could not be --

16:14:58 12 **MR. LAKE:** April of 2003 though July of 2004.

16:15:26 13 **THE COURT:** Go ahead.

16:15:26 14 **MR. LAKE:** And I'd be happy to submit that declaration
16:15:26 15 to you.

16:15:37 16 **THE COURT:** Quick rebuttal?

16:15:37 17 **MR. SNYDER:** I mean, I'll just say --

16:15:37 18 **THE COURT:** I mean, let me just say it sounds to me,
16:15:37 19 just to help you, that perhaps the Plaintiff has a point that he
16:15:37 20 has disclosed, as best he could.

16:15:37 21 And the two items that strike me as being plausibly
16:15:42 22 out there, as far as knowing what happened to them or whether
16:15:45 23 they exist and what's on them are the drives, I'll shorthand
16:15:49 24 that, and the website -- webmail accounts, which he claims are
16:15:55 25 not within the four corners of the order. And just glancing

16:15:58 1 through it myself, it seems to me might be right.

16:16:02 2 **MR. SNYDER:** I respectfully --

16:16:04 3 **THE COURT:** Unless you got something more specific to
16:16:06 4 show that he's just flat out wrong.

16:16:09 5 **MR. SNYDER:** Yes, he's flat out wrong. He did not get
16:16:12 6 any images of the signed purported contracts that they sent to
16:16:17 7 their experts for testing earlier in the case before we believed
16:16:24 8 they manipulated the original document and gave it to us.

16:16:28 9 So that in the possession of their experts are scanned
16:16:32 10 images of the purported contract bearing signatures. Those have
16:16:38 11 not been produced to us. They do not want to produce those to
16:16:42 12 us because our experts believe they will be different than the
16:16:46 13 other versions of the purported contract floating around in this
16:16:50 14 case.

16:16:51 15 **THE COURT:** Can we hear what the answer to that is? I
16:16:54 16 think he said that there is no such thing.

16:16:57 17 **MR. LAKE:** No, I thought he was referring to the -- if
16:17:00 18 there had been a soft version of the contract emailed to an
16:17:04 19 attorney or expert, and we produced that.

16:17:08 20 We concede that there was an email that was sent and I
16:17:12 21 compared it and it had item 5 and item 8 on it. I saw the email
16:17:18 22 that was sent. I saw the attachment. I printed it out.

16:17:22 23 I printed out 5 and 8, laid them side by side. They
16:17:26 24 were the same. If what he's trying to ask for now is that he
16:17:31 25 wants information and work product of undesignated expert --

16:17:36 1 **THE COURT:** No, no. He's saying that --

16:17:38 2 **MR. SNYDER:** Let me be very clear. Their expert had
16:17:40 3 in their possession at one point the original ink contract. The
16:17:46 4 experts took scans of them. They have those scans, we want to
16:17:51 5 see those scans.

16:17:52 6 **THE COURT:** The three dimensional scans?

16:17:55 7 **MR. SNYDER:** Yes. We want to see those scans because
16:17:56 8 we believe that when they scanned the original contract, it
16:17:56 9 looked one way and then when it was made available to us for
16:18:01 10 physical inspection more recently, it looked a different way and
16:18:03 11 had been altered in different ways that we'll disclose to the
16:18:09 12 Court when the expert testing has been completed.

16:18:12 13 **THE COURT:** They were altered by the experts?

16:18:16 14 **MR. SNYDER:** No, altered to the by the Plaintiff.

16:18:18 15 **THE COURT:** If they were turned over to the experts,
16:18:21 16 how would he have continued access to it?

16:18:21 17 **MR. SNYDER:** He took physical custody of the original
16:18:24 18 back and had it for some number of months before he made it
16:18:28 19 available to us over his objection pursuant to Your Honor's
16:18:31 20 order.

16:18:31 21 But at an earlier point in time, he gave the original
16:18:35 22 contract, made it available to his experts, his experts took
16:18:38 23 pictures or scans of them. We want those pictures and scans.
16:18:42 24 They're not protected. They're not work product. They're
16:18:46 25 evidence in the case.

16:18:47 1 **THE COURT:** I thought you were talking about some
16:18:48 2 native version of the contract.

16:18:50 3 **MR. SNYDER:** That too.

16:18:52 4 **THE COURT:** I guess I'm a little confused about what
16:18:55 5 it is you're driving at. Electronic forms of the declaration of
16:19:01 6 the 12th or the original electronic emails?

16:19:04 7 **MR. SNYDER:** Your Honor, there are three different
16:19:09 8 electronic categories of the contract. One, any electronic
16:19:12 9 versions of the original alleged contracts -- of the alleged
16:19:17 10 contract that resides in any of his computers or storage
16:19:20 11 devices, we have none and that's what's attached to the
16:19:24 12 complaint. Whether it's on a computer, a CD, a floppy disc or a
16:19:28 13 storage device. That's one.

16:19:29 14 Two, any image of the original contract, meaning the
16:19:35 15 original one that was in the safe deposit box that was taken
16:19:39 16 either by the Plaintiff or by the Plaintiff's experts at any
16:19:43 17 point in time.

16:19:46 18 **MR. LAKE:** And, Your Honor, the order requires the
16:19:49 19 production of copies of the purported contract in hard copy form
16:19:53 20 created on or before June 30th, 2010. That's at the first page
16:19:58 21 of the order. It doesn't say all of the work product ever.

16:20:03 22 **MR. SNYDER:** That's hard copy only, Your Honor, not
16:20:09 23 electronic.

16:20:09 24 **MR. LAKE:** Right. And we produced the electronic,
16:20:09 25 that's what I'm saying. Now, they're saying they want -- he

16:20:09 1 says he wants a scan of the hard copy that was taken after June
16:20:14 2 30th, 2010. That's outside of the scope of the order.

16:20:17 3 **MR. SNYDER:** No, it's not. It's an electronic.

16:20:18 4 **THE COURT:** Just a second. So it's not a native
16:20:31 5 electronic version, according to you? It's not a original
16:20:34 6 native file --

16:20:36 7 **MR. SNYDER:** But it is an electronic copy, Your Honor.
16:20:41 8 It's an image that their experts took off the original contract
16:20:46 9 and we want those images. They're suppressing them because that
16:20:50 10 is --

16:20:50 11 **MR. LAKE:** No, because it was not created on or before
16:20:53 12 June 30th, 2010. The order says created. If he's saying a scan
16:21:00 13 was created on or before June 30th, 2010, he's right, but there
16:21:06 14 aren't any.

16:21:06 15 If he wants our non-designated expert's work product,
16:21:13 16 he's not entitled to it. Rule 26 protects that and the order
16:21:17 17 itself says created.

16:21:19 18 So if that scan would have been created before June
16:21:22 19 30th, 2010, he's right, but what he's asking for is a new
16:21:34 20 request. He's asking for us to divulge to the Court our
16:21:34 21 undesignated expert work product.

16:21:34 22 **MR. SNYDER:** Mr. Lake is mistaken. He's referring to
16:21:36 23 his hard copy assets. It's clear in document 83 the so-called
16:21:42 24 electronic asset order that he is directed to produce all
16:21:47 25 electronic copies of the purported contract in the possession,

16:21:49 1 custody and control of this Plaintiff.

16:21:52 2 And the expert's files are electronic copies of the
16:21:55 3 purported contract, which they imaged off of the original and
16:21:59 4 referenced in the various declarations to this Court.

16:22:03 5 They do not want us to see those images because those
16:22:08 6 images contain pictures that look different than the images
16:22:11 7 taken off the original contract today.

16:22:15 8 **MR. LAKE:** Electronic copies of the native electronic
16:22:19 9 copies, that was just debated. That's what was on the
16:22:22 10 computers. He's now trying to expand that into our expert work
16:22:25 11 product.

16:22:25 12 **MR. SNYDER:** No.

16:22:25 13 **MR. LAKE:** And that was contained in the order.

16:22:26 14 **THE COURT:** Just a second. If I can make sure I'm
16:22:30 15 tracking down what you gentlemen are telling me. The order
16:22:32 16 refers to turning over all original signed versions of the
16:22:37 17 purported contract attached to the complaint. That's not what
16:22:41 18 we're referring to.

16:22:42 19 Next, all copies of the purported contract in hard
16:22:45 20 copy form created on or before June 30th. That's not what we
16:22:50 21 are referring to. All copies of emails, not relevant.

16:22:54 22 And then we go on in the second order paragraph on
16:22:58 23 page two. Required to produce the following electronic assets:
16:23:05 24 Native electronic version of the purported contract. That's not
16:23:09 25 what we're referring to. There's no date of creation associated

16:23:15 1 with that. The original native electronic file consisting of or
16:23:22 2 containing the emails. That's not pertinent.

16:23:22 3 **MR. SNYDER:** Your Honor, what --

16:23:24 4 **THE COURT:** So what I'm trying to understand is how
16:23:27 5 this image of the original contract made by the Plaintiff or an
16:23:32 6 expert falls within these categories.

16:23:35 7 **MR. SNYDER:** Your Honor, missed the actual operative
16:23:39 8 language. In the conjunctive, it says the native electronic
16:23:44 9 version of the purported contract and all electronic copies of
16:23:49 10 the purported contract.

16:23:50 11 **THE COURT:** Oh, I see. This image is an electronic
16:23:54 12 copy.

16:23:57 13 **MR. SNYDER:** That's exactly what it is.

16:23:57 14 **MR. LAKE:** No. An electronic copy, he's talking about
16:24:00 15 the native -- the stuff that's on the discs. What we just
16:24:03 16 covered, the seven drafts.

16:24:03 17 **MR. SNYDER:** No, Your Honor.

16:24:04 18 **MR. LAKE:** That's why we have native electronic and
16:24:07 19 all electronic copies.

16:24:09 20 **THE COURT:** How is this image created?

16:24:13 21 **MR. LAKE:** Whatever images there are, it could have
16:24:17 22 been a photocopy, it could have been a scanner, could have been
16:24:21 23 a camera.

16:24:22 24 **THE COURT:** You're referring to the high-definition of
16:24:24 25 the scanned original?

16:24:25 1 **MR. SNYDER:** Yes, Your Honor.

16:24:26 2 **THE COURT:** The one that comes up in questions of
16:24:28 3 additional detailing?

16:24:28 4 **MR. SNYDER:** Yes, Your Honor.

16:24:29 5 **THE COURT:** Okay. That's an electronic -- what's
16:24:35 6 construed to be an electronic copy?

16:24:37 7 **MR. SNYDER:** Sure.

16:24:38 8 **THE COURT:** You and --

16:24:40 9 **MR. SNYDER:** And his experts have very expensive
16:24:42 10 high-resolution electronic equipment to produce those electronic
16:24:47 11 copies.

16:24:47 12 **THE COURT:** I'm not familiar with it. Does it come
16:24:49 13 out it -- it's created digitally and then it's produced in real
16:24:57 14 images.

16:24:57 15 **MR. SNYDER:** Yes. It's a high-resolution,
16:25:00 16 high-powered scan. Some of these machines cost thousands and
16:25:01 17 thousands of dollars.

16:25:01 18 **THE COURT:** But it scans and what's scanned is scanned
16:25:04 19 into a digital --

16:25:05 20 **MR. SNYDER:** Yes.

16:25:06 21 **THE COURT:** Digital signals.

16:25:09 22 **MR. SNYDER:** It's a digital file that's created --

16:25:12 23 **THE COURT:** It's stored and then it's reproduced in
16:25:14 24 like a digital photograph?

16:25:16 25 **MR. SNYDER:** It's a digital file that's created by an

16:25:19 1 electronic picture taken of the physical document.

16:25:22 2 **MR. LAKE:** Your Honor, that's not what was
16:25:24 3 contemplated when we made this order. That's not what this
16:25:27 4 order says. They should have designated it under scan and what
16:25:27 5 they're asking for now is a work product of a non-designated
16:25:32 6 expert.

16:25:33 7 This was never made clear. It is not clear in the
16:25:36 8 order. This is not what was contemplated. We gave them the
16:25:41 9 electronic copies we discovered. Now, what they're trying to do
16:25:44 10 is conduct inappropriate discovery.

16:25:44 11 **THE COURT:** I thought that scan was to be shared
16:25:47 12 between the parties.

16:25:49 13 **MR. LAKE:** No, we gave them the actual document. They
16:25:51 14 took this their own scans.

16:25:53 15 **MR. SNYDER:** Your Honor, the reason this is so
16:25:55 16 critical and the reason they're getting so upset by this, two of
16:26:00 17 their experts, Aginsky and Osborn, provided this Court a sworn
16:26:05 18 declaration and they talk about images they took of the original
16:26:09 19 contract.

16:26:10 20 When they took those images of the original contract,
16:26:11 21 the contract looked one way. Our experts believed that in the
16:26:15 22 interim, this Plaintiff, and others, may be acting in concert
16:26:19 23 with him, altered the document in ways to perpetuate his fraud
16:26:22 24 on the Court.

16:26:22 25 We want to compare the image taken at a earlier date

16:26:27 1 by his experts, which they -- the dates they were taken, to the
16:26:34 2 image that was taken of the document today and we will present
16:26:37 3 that to Your Honor in the fullest of time. And we believe that
16:26:39 4 there will be further evidence of the --

16:26:41 5 **THE COURT:** What's the answer to his argument that
16:26:43 6 it's undesignated work product of an expert that requires you to
16:26:48 7 show compelling need?

16:26:50 8 **MR. SNYDER:** It's a completely erroneous analysis.
16:26:53 9 These are two experts who have submitted affidavits to this
16:26:56 10 Court. They have joined issues these two experts on this
16:27:01 11 central question on the so-called authenticity of the contract.

16:27:05 12 We're not asking to invade any work product. We're
16:27:08 13 not asking to invade any communications. We simply want the
16:27:12 14 electronic image taken of the evidence that is an essential
16:27:16 15 piece of evidence in this case. They took a picture of a
16:27:27 16 document. We want the picture. Under no case doctrine or
16:27:27 17 theory is it privileged.

16:27:27 18 **THE COURT:** It becomes a fact rather than an opinion
16:27:29 19 or something like that? Is that what you're saying is the
16:27:32 20 analysis that arguably would be --

16:27:33 21 **MR. SNYDER:** It's not work product. It doesn't
16:27:35 22 contain any mental impression, any legal analysis. It is
16:27:38 23 simply --

16:27:38 24 **THE COURT:** It's not attorney work product, but why
16:27:42 25 doesn't it fall within the provision under Rule 26 that prevents

16:27:47 1 you, in effect, from piggybacking on a adversary's expert?

16:27:52 2 **MR. SNYDER:** We don't want to invade the expert's
16:27:56 3 expertise or opinion. We want the physical evidence --

16:27:57 4 **THE COURT:** You would pay for a copy if there was any
16:28:00 5 cost?

16:28:00 6 **MR. SNYDER:** We would pay for a copy and we want the
16:28:04 7 physical evidence.

16:28:05 8 **THE COURT:** Is it possible to make a copy of it or --

16:28:05 9 **MR. SNYDER:** It existed, Your Honor. It exists in the
16:28:08 10 expert's file today.

16:28:09 11 **THE COURT:** I know that, but can it be in fact
16:28:12 12 technically printed? Can they make more prints of it?

16:28:15 13 **MR. SNYDER:** Yes, Your Honor.

16:28:17 14 **MR. LAKE:** Your Honor, first of all, I didn't brief
16:28:19 15 this. Secondly, it's not in front of the Court. Thirdly, it's
16:28:22 16 improper. And fourth, it couldn't have been contemplated at the
16:28:26 17 time the order was drafted because they hadn't seen the contract
16:28:30 18 to come up with this theory that it could be different from the
16:28:34 19 time they saw it because they hadn't seen it. So they're
16:28:34 20 putting the cart way before the horse.

16:28:37 21 **THE COURT:** I've heard enough on this.

16:28:39 22 **MR. SNYDER:** And Your Honor, on the native emails, I
16:28:40 23 just want to point out the very obvious fact, which is that
16:28:45 24 Mr. Lake said that the reason that the so-called emails exist as
16:28:51 25 Word documents, cut and pasted onto a floppy disc, is because in

16:28:55 1 2003 and 2004, that's the way this Plaintiff did it. Of course
16:28:59 2 that's false.

16:29:01 3 The way this Plaintiff did it is documented and
16:29:04 4 confirmed scientifically in the native emails that we found on
16:29:09 5 his computer, which he sent in 2004 to Sidley and Austin
16:29:09 6 containing the authentic contract.

16:29:09 7 So when it comes time for the authentic contract to
16:29:18 8 find the native emails on his computer, not cut and pasted into
16:29:24 9 Word documents, that low and behold have a StreetFax contract
16:29:25 10 that says nothing about Facebook.

16:29:28 11 When it comes time for him to discuss the so-called
16:29:30 12 emails with Mark Zuckerberg, which are fraudulent and created by
16:29:37 13 this Plaintiff as a faux pas, they don't exist on the native
16:29:39 14 email files, we don't get the native email files because he says
16:29:43 15 his custom and practice at the time was to cut and paste into
16:29:47 16 Word documents.

16:29:48 17 That's a lie because we have his native emails from
16:29:51 18 2004, which isn't a cut and past into a Word document, which has
16:29:56 19 the critical evidence in the case that shows that the contract
16:30:01 20 attached to the complaint is a fraud.

16:30:04 21 And so when he doesn't produce to us native email
16:30:08 22 files containing the alleged contract or containing his alleged
16:30:11 23 emails with Mark Zuckerberg and tells this Court under oath that
16:30:16 24 it's because it's his practice to cut and paste, not thinking
16:30:18 25 we're going to find the native email with TIFF one and TIFF two

16:30:23 1 because he put it on his pen drive, which he no longer has, not
16:30:27 2 thinking we'd fine it, is the height of cynicism.

16:30:34 3 And on that point, Your Honor, when I say authentic
16:30:35 4 contract and the bogus contract and Your Honor says that's what
16:30:38 5 we're going to get, I think it's critical to frame this whole
16:30:42 6 discussion with the following: This Plaintiff, at the same time
16:30:46 7 he was telling Your Honor that the authentic contract should be
16:30:51 8 confidential, was telling the press apparently in rambling
16:30:55 9 emails last night all about the so-called -- or the authentic
16:30:58 10 contract, which he says we planted on his computers before he
16:31:03 11 produced them to us.

16:31:05 12 We went in the clouds and we planted them into his
16:31:11 13 computer by osmosis, a immaculate conception, we don't know he
16:31:14 14 claims it, but he claims somehow we invaded, like martians, his
16:31:18 15 computer and planted this contract and that he's going to prove
16:31:20 16 that it's not authentic and Mr. Lake has the audacity to say
16:31:25 17 that there's no foundation for that and there's no
16:31:25 18 corroboration.

16:31:29 19 And he knows or should know because he has the Stroz
16:31:34 20 Friedberg report that there's ample and substantial
16:31:37 21 authentication corroboration proof-positive that the emails that
16:31:41 22 he sent in 2004 to Sidley and Austin containing the authentic
16:31:48 23 StreetFax contracts were sent in 2004, existed in 2004 and are
16:31:52 24 true and authentic, and were not planted by us. And how he can
16:31:56 25 say that to this Court is outrageous.

16:31:58 1 And let me tell Your Honor why: We not only have --

16:32:02 2 **THE COURT:** He didn't say that.

16:32:04 3 **MR. SNYDER:** Oh, yes, he did.

16:32:05 4 **THE COURT:** Mr. Lake did.

16:32:07 5 **MR. SNYDER:** Mr. Lake said that they were planted,
16:32:08 6 that we believe they were planted, that was the word he used,
16:32:10 7 meaning that somehow Facebook or its agents inserted into his
16:32:15 8 computer this alleged contract.

16:32:15 9 **THE COURT:** When did Mr. Lake say that?

16:32:17 10 **MR. SNYDER:** About 12 minutes ago because I wrote it
16:32:21 11 down, planted in quotes. And it's absurd. His client said the
16:32:23 12 same thing and then he said there's no foundation and no basis
16:32:27 13 to believe that this authentic contract is authentic. He knows
16:32:32 14 or should know that that's false because Stroz has told him that
16:32:32 15 in a variety of ways.

16:32:34 16 And let me tell Your Honor three things on that and
16:32:38 17 it's relevant to all of this: From day one, we made clear that
16:32:42 18 the complaint attached to the -- the contract attached to the
16:32:44 19 complaint was a fraud. We now have the authentic contract
16:32:48 20 between Zuckerberg and StreetFax. It is exactly what Zuckerberg
16:32:53 21 swore to under oath was the case.

16:32:55 22 Now, this was found on the hard drives of the
16:32:57 23 Plaintiff's computer. It was attached to an email sent to the
16:32:59 24 law firm of Sidley and Austin, an international law firm. We
16:33:03 25 not only have the native email --

16:33:15 1 **THE COURT:** Is that where Mr. Cole is associated with?

16:33:15 2 **MR. SNYDER:** Yes. But if I can approach, Your Honor,
16:33:15 3 we also have the metadata that was underlying that original
16:33:19 4 email.

16:33:20 5 And if there's any question, we also have a
16:33:23 6 photograph, which I'll give to Plaintiff's counsel, of the sent
16:33:26 7 outbox that Mr. Ceglia sent in 2004, which attached page one and
16:33:35 8 page two of the contract.

16:33:37 9 We also have a copy of the sent box that shows that it
16:33:42 10 existed and was sent in 2004. We also have has authenticating
16:33:49 11 evidence and corroborating evidence, other forensic evidence --

16:33:54 12 **THE COURT:** Of what?

16:33:55 13 **MR. SNYDER:** Of the authenticity of this StreetFax
16:33:58 14 contract in 2004 that Mr. Ceglia describes himself in in an
16:34:04 15 admission, page one and two of the StreetFax contract.

16:34:08 16 **THE COURT:** I'm trying to connect what you're saying
16:34:11 17 with the existence of this image that they claim --

16:34:14 18 **MR. SNYDER:** Yes. I'll tell Your Honor. We contacted
16:34:15 19 Sidley and Austin. Sidley and Austin has confirmed, Your Honor,
16:34:19 20 that the emails and the authentic contract sent by the Plaintiff
16:34:24 21 to Sidley and Austin in March of 2004 have been on the Sidley
16:34:29 22 and Austin computer server for over seven years.

16:34:33 23 **THE COURT:** Say again.

16:34:34 24 **MR. SNYDER:** Sidley and Austin has confirmed that the
16:34:38 25 email sent to Mr. Ceglia sent to Sidley and Austin attaching

16:34:44 1 page one and page two of the StreetFax contract with Mark, the
16:34:48 2 authentic contract that says nothing about Facebook, was sent
16:34:54 3 contemporaneous, has been on their server since 2004.

16:34:58 4 And low and behold, it looks as exactly as it does on
16:35:02 5 Mr. Ceglia's computer, which is why the notion that it is
16:35:07 6 planted is outrageous and it's with not only no basis, but
16:35:09 7 reckless to even assert in open court.

16:35:12 8 This is the nail in the coffin on any fantastical
16:35:16 9 claim that somehow the authentic StreetFax contract --

16:35:20 10 **THE COURT:** Maybe it was planted on Sidley and
16:35:24 11 Austin's computer too.

16:35:25 12 **MR. SNYDER:** Maybe.

16:35:26 13 **THE COURT:** And maybe they didn't know it because they
16:35:28 14 didn't look until now and it looked to them that it was always
16:35:32 15 there.

16:35:32 16 **MR. SNYDER:** But to believe Mr. Ceglia, you would have
16:35:34 17 to think there was a mass conspiracy among people that dates
16:35:40 18 back in time and it is --

16:35:41 19 **THE COURT:** Okay. What does that have to do with this
16:35:45 20 image?

16:35:45 21 **MR. SNYDER:** It has to do with the image of the noose
16:35:48 22 is tightening up around the neck of this Plaintiff in this case
16:35:51 23 and he knows it.

16:35:52 24 And these scans are going to be further evidence of
16:35:55 25 the fraud because when his experts took pictures of the

16:35:58 1 contract, we believe it was before this Plaintiff got his hands
16:36:02 2 again on this original contract and started monkeying around
16:36:06 3 with it in ways that our experts will disclose more fully when
16:36:10 4 they conclude their tests. And so we want to see those scans --

16:36:15 5 **THE COURT:** And the Plaintiff's expert would be
16:36:17 6 innocent of any knowledge of this, right?

16:36:19 7 **MR. SNYDER:** Presumably so.

16:36:20 8 **THE COURT:** But they did make this original scan,
16:36:23 9 which would give you a basis of comparison, right?

16:36:26 10 **MR. SNYDER:** Yes, Your Honor.

16:36:26 11 **THE COURT:** And as a basis of comparison, you think
16:36:29 12 it's not protected non-testifying expert work product under Rule
16:36:34 13 26?

16:36:34 14 **MR. SNYDER:** Yes. And I could put it at a finer
16:36:35 15 point --

16:36:35 16 **THE COURT:** Because it's a fact rather than a --
16:36:38 17 rather than the use of expertise, if you will, at Plaintiff's
16:36:42 18 cost.

16:36:42 19 **MR. SNYDER:** And this isn't mere speculation.

16:36:45 20 **THE COURT:** It's like an expert on accident
16:36:47 21 reconstruction taking a photograph of, say, an interest.

16:36:51 22 **MR. SNYDER:** Yes.

16:36:52 23 **THE COURT:** And the photograph arguably would not be
16:36:56 24 protected because anybody can take a photograph, it doesn't
16:36:59 25 require any expertise.

16:37:00 1 **MR. SNYDER:** Yes, Your Honor.

16:37:01 2 **THE COURT:** The analysis of it might be, but not the
16:37:01 3 photograph itself.

16:37:01 4 **MR. SNYDER:** Precisely.

16:37:03 5 **THE COURT:** Is that a fair statement? Maybe that's
16:37:05 6 not a bad --

16:37:05 7 **MR. SNYDER:** That's precise, Your Honor. That's
16:37:08 8 precisely so. And this is not speculation in our part. Our
16:37:11 9 experts, who I think your Your Honor is aware are very
16:37:15 10 credentialed, among the best in the world --

16:37:15 11 **THE COURT:** Well, his experts are pretty
16:37:19 12 well-credentialed too.

16:37:19 13 **MR. SNYDER:** That's for another day.

16:37:20 14 **THE COURT:** No, no. It's going to come up
16:37:24 15 momentarily.

16:37:24 16 **MR. SNYDER:** Our experts, who are among -- who are
16:37:27 17 used by the U.S. Government --

16:37:28 18 **THE COURT:** I have your point.

16:37:29 19 **MR. SNYDER:** But the --

16:37:30 20 **THE COURT:** The question is for purposes of the order
16:37:33 21 whether or not it's an electronic version of the original.

16:37:38 22 **MR. SNYDER:** Yes.

16:37:38 23 **THE COURT:** And even though Mr. Lake didn't think of
16:37:43 24 it that way, and maybe you didn't either --

16:37:46 25 **MR. SNYDER:** We did. We found seven multiple letters

16:37:48 1 on this, Your Honor.

16:37:50 2 **THE COURT:** Well, before -- not during the time you
16:37:53 3 were drafting --

16:37:53 4 **MR. SNYDER:** When we were drafting it, it was uniquely
16:37:56 5 within our awareness and we were contemplated what --

16:37:57 6 **THE COURT:** Why don't you say images --

16:38:00 7 **MR. SNYDER:** Because an electronic copy is an image,
16:38:08 8 Your Honor.

16:38:08 9 **MR. LAKE:** Right. Sure.

16:38:11 10 **THE COURT:** Pardon me.

16:38:11 11 **MR. SNYDER:** I think he said yeah, right. Sure.

16:38:12 12 And, Your Honor, this is not speculation on our part
16:38:14 13 that this document that was made available to us for physical
16:38:18 14 inspection several weeks ago has undergone manipulation by the
16:38:23 15 plaintiff.

16:38:24 16 Our experts, and I could represent to the Court will
16:38:27 17 elucidate this further, observed on the original document that
16:38:31 18 was made available to us, highly unusual attributes, which are
16:38:36 19 highly suggestive of manipulations in efforts to artificially
16:38:42 20 treat the document.

16:38:43 21 And we believe --

16:38:44 22 **THE COURT:** That is on their scan?

16:38:45 23 **MR. SNYDER:** This is on our scan.

16:38:47 24 **THE COURT:** Your scan?

16:38:48 25 **MR. SNYDER:** And when we see the scan that was taken

16:39:01 1 at an earlier time, we believe that those scans may look
16:39:01 2 different.

16:39:01 3 **THE COURT:** So the trier of fact would conclude that
16:39:01 4 if these deviations exist and aren't otherwise explained, it
16:39:04 5 could inferentially be explained by some sort of manipulation of
16:39:08 6 the Plaintiff, even if the Plaintiff denied such?

16:39:11 7 **MR. SNYDER:** After the commencement of the lawsuit.

16:39:13 8 **THE COURT:** Concurrent?

16:39:14 9 **MR. SNYDER:** Correct.

16:39:16 10 **MR. LAKE:** Your Honor, this is a fantastic argument
16:39:19 11 and he's practicing for his motion for summary judgement. And
16:39:22 12 as soon as we're done with discovery and all of our experts have
16:39:26 13 produced their evidence and they have produced their evidence,
16:39:28 14 he can file a summary judgement, he can read the transcript back
16:39:32 15 to you again --

16:39:33 16 **THE COURT:** Oh, I think he's intending to file
16:39:35 17 something other than a summary judgement motion.

16:39:38 18 **MR. SNYDER:** That's correct, Your Honor. We do intend
16:39:40 19 to file something other than a summary judgement motion.

16:39:40 20 **THE COURT:** I'm not encouraging it, but I can see it.
16:39:44 21 I can see it coming over Lake Erie as we know it, over the
16:39:47 22 Hudson.

16:39:47 23 **MR. SNYDER:** Over the Hudson to Lake Erie.

16:39:52 24 **THE COURT:** All right.

16:39:54 25 **MR. LAKE:** And when he brings his motion for summary

16:39:54 1 judgement or whatever motions he wants, we'll address them. And
16:39:57 2 in the meantime --

16:39:58 3 **THE COURT:** In the interest of time, we still have
16:40:00 4 what other issues? I'm about to resolve this first issue about
16:40:04 5 the sequential production slash adequacy of this Plaintiff's
16:40:09 6 certification slash production. We still have to deal with the
16:40:16 7 issue of the additional testing on the ink tests.

16:40:21 8 **MR. SNYDER:** The ink testing and the Rule 11
16:40:24 9 certification.

16:40:25 10 **MR. LAKE:** And mediation.

16:40:29 11 **MR. SNYDER:** Mediation, Your Honor, there is no
16:40:31 12 mediation.

16:40:33 13 **THE COURT:** Thank you. Thank you.

16:40:36 14 On the Plaintiff's request for production, the motion
16:40:39 15 is denied. The Court's order clearly contemplates sequential
16:40:45 16 production, after the adequacy of the Plaintiff's production per
16:40:49 17 the order.

16:40:50 18 I find that based on the arguments presented by the
16:40:55 19 Defendant and the Plaintiff, that the Plaintiff owes the
16:41:01 20 defendant a further certification and/or production relative to
16:41:07 21 the USB drives, the additional drives, the --

16:41:20 22 Well, actually, I'm persuaded that the Plaintiff needs
16:41:23 23 to provide a supplemental certification either explaining why
16:41:31 24 they don't exist or why they no longer exist as to the native
16:41:35 25 electronic version of the purported contract, all electronic

16:41:39 1 copies of the purported contract, including those in the
16:41:42 2 possession of his attorneys or experts.

16:41:50 3 I am also ruling that the image of the original
16:41:59 4 contract in the possession of Plaintiff's expert is also within
16:42:04 5 the disclosure and the production requirement of the order at
16:42:09 6 page two, first -- second ordering paragraph, native electronic
16:42:17 7 version of the contract attached to the complaint and all
16:42:18 8 electronic copies of the purported contract, including the forms
16:42:21 9 described in paragraph A of Mr. Ceglia's declaration.

16:42:26 10 I'm overruling any objection that this is expert work
16:42:30 11 product pursuant to Rule 26 of the non-testifying Plaintiff's
16:42:36 12 experts.

16:42:37 13 As to the webmail, it is not within the four corners
16:42:42 14 of the electronic asset production. However, based on the
16:42:47 15 presentation and without -- and in a need to accelerate
16:42:52 16 resolution of this phase of discovery, I am requiring the
16:42:56 17 Plaintiff to -- what is it we want to do here? We want to
16:43:00 18 consent to the acquisition and inspection of his webmail
16:43:05 19 accounts by the Defendants' experts pursuant to the protocol,
16:43:10 20 Mr. Snyder?

16:43:10 21 **MR. SNYDER:** Yes, Your Honor.

16:43:11 22 **THE COURT:** That is so ordered. That production --
16:43:14 23 all of this production will be provided within 10 days. What
16:43:21 24 haven't I covered here?

16:43:23 25 Electronic forms described in his June 12th

16:43:29 1 declaration, Mr. -- and the native electronic files consisting
16:43:32 2 of or containing the purported emails and all electronic copies
16:43:36 3 of all such emails.

16:43:38 4 Now, Mr. Lake says there are none in the possession of
16:43:41 5 the Plaintiff. What are we going to do with that?

16:43:42 6 **MR. SNYDER:** You know, I think that in the end his
16:43:45 7 client will swear to whatever his truth is about the subject and
16:43:49 8 then we'll evaluate it from there.

16:43:51 9 **THE COURT:** Shall we require a supplemental
16:43:53 10 declaration identifying and/or producing those items as well?

16:43:58 11 If he has explanations that he wants to put forth
16:44:02 12 under oath, Mr. Lake, we will -- obviously that's what will be
16:44:08 13 forthcoming.

16:44:09 14 But I'm satisfied that we need another round of the
16:44:14 15 Plaintiff to reflect on these issues and to make a very explicit
16:44:20 16 declaration responding to these additional requests. And that
16:44:24 17 will be within 10 days.

16:44:28 18 **MR. LAKE:** Your Honor, if we may. Can we have it
16:44:30 19 written up in an order so I can provide it to --

16:44:32 20 **THE COURT:** Yes.

16:44:33 21 **MR. SNYDER:** Thank you.

16:44:33 22 **THE COURT:** My intention here is that upon receipt of
16:44:39 23 these supplemental certifications and/or productions, that the
16:44:45 24 -- we need the webmail, don't we? Do you want the webmail
16:44:49 25 before you produce the Harvard emails?

16:44:53 1 **MR. SNYDER:** For sure, Your Honor.

16:44:54 2 **THE COURT:** For sure.

16:44:54 3 **MR. SNYDER:** And so Your Honor is aware, yes, because
16:44:58 4 we believe that he --

16:44:59 5 **THE COURT:** I'm just trying to get off on the
16:45:02 6 production. Your production was required within -- what was it
16:45:04 7 again?

16:45:04 8 **MR. SNYDER:** Five days, Your Honor.

16:45:06 9 **THE COURT:** Within five days of the later now court
16:45:11 10 ordered supplemental certification and/or production, as well as
16:45:17 11 the acquisition and inception of the webmail accounts.

16:45:22 12 Upon completion of those tasks, the Defendants'
16:45:27 13 obligations to provide the disc containing all of the so-called
16:45:40 14 Harvard emails will be triggered. Is that correct, Mr. Snyder?

16:45:40 15 **MR. SNYDER:** Yes, Your Honor.

16:45:40 16 **THE COURT:** Thank you. Now, as far as a written order
16:45:40 17 is concerned, because the Defendant is the prevailing party on
16:45:43 18 this issue, I'm going to direct the Defendant to draft the
16:45:47 19 Court's order in written form, much as we did with the original
16:45:52 20 order, present it to Mr. Lake.

16:45:54 21 If there's disagreement over text, the Court will be
16:45:59 22 available at 10:00 tomorrow to deal with the issue. And we
16:46:04 23 haven't gotten to the ink testing issue, which I think I'm about
16:46:09 24 to tackle. And that is so ordered.

16:46:12 25 **MR. LAKE:** Your Honor, if I may be heard briefly.

16:46:14 1 One, if it can be 10 days from the actual order as opposed to
16:46:19 2 today, even that extra day will help me so we that we can get to
16:46:24 3 work.

16:46:24 4 **THE COURT:** Yeah, 10 days from the filing of the
16:46:26 5 actual order.

16:46:27 6 **MR. LAKE:** Thank you. And then secondly, and this
16:46:29 7 came up before just so it's clear, the way we interpreted the
16:46:34 8 protocol for the electronically-stored information was we were
16:46:40 9 entitled to the emails five days after producing that
16:46:44 10 information to Stroz because once that information left our
16:46:47 11 hands and was in Stroz's possession, the clock should start
16:46:52 12 ticking and we should be able to get the emails within five days
16:46:55 13 of production to Stroz, not five days from Stroz because Stroz
16:47:00 14 is going have to go through it again, to a relevancy search,
16:47:04 15 produce another log.

16:47:04 16 We're going to have our five days to review it for
16:47:08 17 privilege and confidentiality. I don't know how much
16:47:11 18 information is in these email accounts. I don't know what they
16:47:14 19 are, but Stroz is going to have to go through the same procedure
16:47:18 20 as last time. That could take up to -- it took them about a
16:47:21 21 week before. It could take another week or more or less. I
16:47:25 22 don't know since I have never seen any of this information. So
16:47:28 23 I want some clarification as to --

16:47:31 24 **THE COURT:** Production according to the order is --
16:47:34 25 I'm not sure I can find the object of the sentence. Production

16:47:40 1 to whom, Mr. Snyder?

16:47:41 2 **MR. SNYDER:** It's silent. I think.

16:47:44 3 **THE COURT:** Yeah, that's what I thought.

16:47:45 4 **MR. SNYDER:** I think under the circumstances that it
16:47:47 5 is fair and prudent to trigger our production obligations upon
16:47:54 6 five days upon our receipt of the findings because until such
16:48:00 7 time we will have no way of knowing if the Plaintiff is
16:48:03 8 compliant.

16:48:03 9 **THE COURT:** He's saying five days after this Stroz and
16:48:07 10 Friedberg --

16:48:07 11 **MR. SNYDER:** Right. And we think that it should be
16:48:11 12 five days after we have the results of Stroz Friedberg because
16:48:15 13 until that time, we'll have no way of knowing if the Plaintiff
16:48:16 14 is continuing to play games or incompliant.

16:48:19 15 And to be clear, the emails, Your Honor, the Harvard
16:48:22 16 emails are ready to be produced. They're on a disc.

16:48:26 17 **THE COURT:** I know you said that, but I'm focussing on
16:48:29 18 this webmail account issue. Your request is that Stroz and
16:48:36 19 Friedberg inspect it.

16:48:36 20 **MR. SNYDER:** Yes.

16:48:37 21 **THE COURT:** Well, I mean, if that's the last thing,
16:48:40 22 then that right there has to be five days after they look at it.

16:48:44 23 **MR. SNYDER:** Right, five days after they report to us
16:48:44 24 --

16:48:48 25 **THE COURT:** You're not going to look at it?

16:48:49 1 **MR. SNYDER:** No, but they'll report to us that it is
16:48:52 2 in compliance. He has given them proper access, that they have
16:48:57 3 been able to conduct the searches.

16:48:57 4 **THE COURT:** How about that, Mr. Lake?

16:48:59 5 **MR. LAKE:** Well, what's left in our possession, they
16:49:03 6 are going to have a complete copy of it. If anything has
16:49:06 7 changed, they'll know.

16:49:08 8 **MR. SNYDER:** I think Stroz Friedberg could act
16:49:14 9 expeditiously and we could say five days after Stroz Friedberg
16:49:18 10 gives us the results, but in no event say later than, say --

16:49:26 11 **MR. LAKE:** Why not the day? The day that Stroz
16:49:30 12 Friedberg turns it over then it's done.

16:49:31 13 **THE COURT:** I know you're anxious and we want you to
16:49:35 14 have them. That is obviously a major point. But the other
16:49:37 15 major point is there's no question in my mind that the reason
16:49:40 16 for the sequential was because of the concern of potential
16:49:43 17 manipulation.

16:49:45 18 Whether well-founded or not, it's besides the point.
16:49:49 19 That was our judgement at the time of this so I'm just not quite
16:49:52 20 sure how to frame the triggering mechanism that --

16:49:55 21 **MR. SNYDER:** We think that be should five days. We
16:49:58 22 will produce the Harvard emails five days after Stroz Friedberg
16:50:03 23 reports that the Plaintiff has complied with the order with
16:50:05 24 respect to the webmail-based account.

16:50:10 25 **THE COURT:** The emails at Harvard are already set in

16:50:13 1 stone, so to speak?

16:50:14 2 **MR. SNYDER:** Yes.

16:50:14 3 **MR. LAKE:** We don't know that.

16:50:15 4 **MR. SNYDER:** Harvard University has preserved them.

16:50:19 5 **THE COURT:** No one is suggesting that Mr. Zuckerberg
16:50:23 6 can go back and plant or manipulate those --

16:50:27 7 **MR. SNYDER:** The Plaintiff has suggested that.

16:50:29 8 **MR. LAKE:** Of course he's suggested that.

16:50:31 9 **THE COURT:** We have seen no evidence of that?

16:50:33 10 **MR. SNYDER:** No evidence whatsoever.

16:50:33 11 **MR. LAKE:** Because we haven't propounded discovery
16:50:36 12 yet.

16:50:36 13 **THE COURT:** Well, you know, you play the hand that's
16:50:43 14 dealt to you in this business.

16:50:44 15 **MR. LAKE:** Understood.

16:50:46 16 **THE COURT:** So it's five days after Stroz -- draft the
16:50:49 17 order this way. I see you have Ms. Aycock's able assistance in
16:51:04 18 that department. So five days after they report to Defendants'
16:51:04 19 attorney.

16:51:08 20 Next issue is the -- in the interest of time, why do
16:51:08 21 you need -- let's take a five minute break.

16:57:24 22 (A recess was then taken.)

16:57:24 23 **MR. SNYDER:** Should I address the sampling?

16:57:35 24 **THE COURT:** No, I think I can move through that more
16:57:35 25 quickly. I read all of the papers on that and the question I

16:57:35 1 have is why does your expert need the additional samples? I
16:57:38 2 don't think that's explained.

16:57:39 3 **MR. SNYDER:** That's an excellent question, Your Honor,
16:57:41 4 and I can give you an explanation. We didn't explain it for a
16:57:45 5 particular reason.

16:57:46 6 **THE COURT:** You can remain seated. If you really feel
16:57:48 7 you need to stand, come to the podium.

16:57:52 8 **MR. SNYDER:** Your Honor, our experts observed on the
16:57:54 9 original document that was taken out of the safe deposit box
16:58:01 10 that Mr. Argentieri has custody of an incredibly unusual
16:58:05 11 document, unlike any our experts have ever seen and these are
16:58:09 12 the leading forensic experts --

16:58:12 13 **THE COURT:** You're talking about the original alleged
16:58:14 14 contract that gives rise to Mr. Ceglia's 50 percent interest in
16:58:19 15 the --

16:58:19 16 **MR. SNYDER:** Yes, Your Honor. It is a highly unusual
16:58:23 17 irregular document. It is a faded goldish-brown ink that has an
16:58:30 18 odd ecru tinge on the front of page one. It is highly
16:58:34 19 suggestive of having undergone artificial --

16:58:39 20 **THE COURT:** My question is I mean, they've taken a
16:58:44 21 number of samples.

16:58:45 22 **MR. SNYDER:** No, Your Honor. Let me explain the basis
16:58:48 23 of our request.

16:58:50 24 **THE COURT:** What is all these pictures I have in front
16:58:53 25 of me and all the little black dots --

16:58:53 1 **MR. SNYDER:** I will explain. First, Your Honor, in an
16:58:57 2 attempt to accommodate Plaintiff's counsel, we agreed in the
16:59:01 3 first instance to limit the number of initial ink samples that
16:59:07 4 our experts would take on the understanding, clear
16:59:10 5 understanding, which I don't think Mr. Lake would dispute, that
16:59:14 6 we would be permitted the opportunity to take additional samples
16:59:19 7 later. Mr. Lake agreed.

16:59:20 8 He said if there are sufficient ink samples available,
16:59:24 9 after Plaintiff's experts had done their ink sampling, then he
16:59:28 10 would consent to and not object to our experts extracting
16:59:33 11 additional samples.

16:59:34 12 **THE COURT:** They changed their mind.

16:59:35 13 **MR. SNYDER:** Right.

16:59:36 14 **THE COURT:** So tell me why your expert needs the
16:59:39 15 initial samples.

16:59:40 16 **MR. SNYDER:** Because we did not take as many samples
16:59:43 17 as we would have to accommodate Mr. Lake who wanted to take his
16:59:48 18 samples.

16:59:50 19 **THE COURT:** Why didn't they take.

16:59:52 20 **MR. SNYDER:** It would have taken more time.

16:59:54 21 **THE COURT:** Who cares.

16:59:55 22 **MR. SNYDER:** Hindsight being 20/20, we shouldn't have
16:59:57 23 accommodated Mr. Lake and we should have taken all our samples.

17:00:02 24 **THE COURT:** You're telling me that your expert, when
17:00:04 25 they had the opportunity to take critical samples of the

17:00:08 1 document, didn't take all the samples that their expertise told
17:00:12 2 them to take because they actually acquiesced to some arm waving
17:00:17 3 by the Plaintiff that they wanted to stop that process in order
17:00:21 4 to commence their own process --

17:00:23 5 **MR. SNYDER:** Yes, Mr. Lake --

17:00:24 6 **THE COURT:** -- risking that we would end up in a
17:00:27 7 courtroom arguing over whether or not those additional --

17:00:29 8 **MR. SNYDER:** No, not thinking --

17:00:29 9 **THE COURT:** Just a second. Those additional samples
17:00:33 10 are critical to your ability to analyze the authenticity of the
17:00:38 11 document?

17:00:38 12 **MR. SNYDER:** No, Your Honor, I'm not say saying that.

17:00:41 13 **THE COURT:** What are you telling me?

17:00:41 14 **MR. SNYDER:** Mr. Lake threatened that if we did not
17:00:45 15 stop testing, he would go to court and pull the document. And
17:00:47 16 Mr. Flynn was there and Mr. Southwell was there and we never --

17:00:53 17 **THE COURT:** How could he take the testing?

17:00:55 18 **MR. SNYDER:** How would take -- physically take the
17:00:55 19 document.

17:00:56 20 **THE COURT:** How could he do such a thing?

17:00:58 21 **MR. SNYDER:** He threatened it. And we said in
17:00:58 22 accomodation --

17:01:00 23 **THE COURT:** He'd be guilty of interfering with the
17:01:01 24 administration of the court order.

17:01:05 25 **MR. SNYDER:** Mr. Flynn can talk to the Court about

17:01:07 1 credibility.

17:01:08 2 **THE COURT:** He threatened to run away with the
17:01:11 3 document and I wasn't consulted at that time?

17:01:15 4 **MR. FLYNN:** May I, Your Honor?

17:01:16 5 **THE COURT:** Just a second. I want to understand the
17:01:17 6 logic behind that.

17:01:17 7 **MR. SNYDER:** I was not present so I feel more
17:01:24 8 comfortable asking Mr. Flynn to address the Court.

17:01:24 9 **THE COURT:** So after this procedure was done, it was
17:01:26 10 always the Defendants' need to ask for another round of samples?

17:01:33 11 **MR. SNYDER:** No, Your Honor.

17:01:35 12 **THE COURT:** No?

17:01:35 13 **MR. SNYDER:** Because we believe consistent with
17:01:37 14 Mr. Lake's representation to us that he would give us the
17:01:41 15 document back to complete our sampling and there is more than
17:01:44 16 enough ink left --

17:01:46 17 **THE COURT:** At that time?

17:01:46 18 **MR. SNYDER:** When his expert was done. That was his
17:01:48 19 request and we said no harm no foul. If you want to test it and
17:01:52 20 give it back to us and then we --

17:01:53 21 **THE COURT:** Running the risk that we would end up in
17:01:56 22 this situation?

17:01:57 23 **MR. SNYDER:** We never dreamt that he would pull the
17:02:00 24 charade of suggesting that there's not enough ink to test --

17:02:03 25 **THE COURT:** Did you or your expert memorialize this

17:02:07 1 insufficient testing at the time? Did you advise the Court of
17:02:13 2 it?

17:02:13 3 **MR. SNYDER:** I would have to ask Mr. Flynn. I wasn't
17:02:16 4 present.

17:02:16 5 **THE COURT:** Why should the Court -- although I'm
17:02:20 6 making the Plaintiff's argument. Why shouldn't Mr. Lake say
17:02:27 7 this is a recent concoction that the Plaintiff the -- that the
17:02:32 8 Defendants had dreamed up here because their expert botched the
17:02:35 9 first round --

17:02:35 10 **MR. SNYDER:** No, our expert did it perfectly.

17:02:38 11 **THE COURT:** Or they're really not expert or they want
17:02:41 12 to destroy the document.

17:02:42 13 **MR. SNYDER:** Okay. Your Honor, there are three ways
17:02:42 14 to respond to this. One, the order has no --

17:02:44 15 **THE COURT:** These are fair questions, aren't they?
17:02:46 16 You might not like them.

17:02:47 17 **MR. SNYDER:** With all due respect, I don't think they
17:02:50 18 are and I'll tell Your Honor why.

17:02:51 19 **THE COURT:** Okay.

17:02:52 20 **MR. SNYDER:** The protocol does not restrict our
17:02:55 21 ability to take ink samples or say how and in what order they
17:02:59 22 should be taken.

17:02:59 23 We were in a cooperative group process in terms of how
17:03:10 24 these documents would be tested, whose expert would to be where,
17:03:10 25 these people were in a room for days and days and days

17:03:11 1 accommodating in a way --

17:03:12 2 **THE COURT:** Excuse me. Referring to representatives
17:03:14 3 of the Defendants?

17:03:15 4 **MR. SNYDER:** Counsel for the Defendants, counsel for
17:03:18 5 Plaintiffs were in Mr. Flynn's office for a period of days. And
17:03:22 6 Ms. Aycock was there, Mr. Southwell, Mr. Benjamin was there and
17:03:25 7 Mr. Lake was there, Mr. Argentieri was there, the experts were
17:03:30 8 there.

17:03:30 9 It was a cooperative back and forth, during which
17:03:33 10 Mr. Lake said can you guys stop -- don't -- can you limit the
17:03:39 11 number of ink test samples you're going to take, let my experts
17:03:40 12 take some ink and then we'll give the document back to you and
17:03:40 13 your experts can continue.

17:03:43 14 **THE COURT:** Didn't your experts challenge that --

17:03:43 15 **MR. SNYDER:** No.

17:03:45 16 **THE COURT:** -- and say why do we need to do that?

17:03:46 17 **MR. SNYDER:** Nope, we didn't do that. It wasn't a big
17:03:48 18 deal to us. We were getting the document back and there's more
17:03:49 19 than enough ink to go around.

17:03:52 20 **THE COURT:** That's not the point. It doesn't
17:03:55 21 interfere with the integrity of the testing process?

17:03:57 22 **MR. SNYDER:** Absolutely not because all we --

17:03:58 23 **THE COURT:** It doesn't subject the expert's
17:04:02 24 examination as to the validity of the process?

17:04:02 25 **MR. SNYDER:** Absolutely not because the expert can

17:04:05 1 document --

17:04:05 2 **THE COURT:** Famous last words.

17:04:07 3 **MR. SNYDER:** No. We're very confident that our expert
17:04:10 4 can and will document following to the letter the procedures
17:04:13 5 that --

17:04:14 6 **THE COURT:** I'm just trying to move this along. It
17:04:17 7 was an unexpected request coming from Mr. Lake and rather than
17:04:21 8 to contest it and play hardball by calling the Court for
17:04:25 9 assistance --

17:04:26 10 **MR. SNYDER:** Right.

17:04:26 11 **THE COURT:** -- you just accommodated him?

17:04:29 12 **MR. SNYDER:** Yes, because Dr. Lyter, our expert, said
17:04:33 13 there is more than enough ink to go around. When we get the
17:04:36 14 document back, we'll finish our testing.

17:04:36 15 **THE COURT:** And Mr. Lake seemed to acquiesce in that
17:04:40 16 statement? Was that representation made at that time.

17:04:45 17 **MR. SNYDER:** Yes, that representation was made to
17:04:46 18 Mr. Southwell by Mr. Lake and the reason they don't want --

17:04:48 19 **THE COURT:** But none of that is in any of the papers.
17:04:51 20 There's no affidavit submitted.

17:04:51 21 **MR. SNYDER:** Well, Mr. Southwell does put in a
17:04:53 22 affidavit swearing to all of that.

17:04:56 23 **THE COURT:** Oh, really? Where is that?

17:04:57 24 **MR. SNYDER:** And un-objected to. Mr. Lake has not
17:05:02 25 sworn to the contrary.

17:05:27 1 **THE COURT:** Where is that?

17:05:27 2 **MR. SNYDER:** This will be number 97, Your Honor. And
17:05:50 3 in his affidavit, Mr. Southwell describes --

17:05:52 4 **THE COURT:** What paragraph?

17:05:53 5 **MR. SNYDER:** Paragraphs 29 through 34 and 34 is the
17:05:58 6 relevant paragraph where he describes, Mr. Southwell, his
17:06:04 7 conversation with Mr. Lake and Mr. Lake does not put in any
17:06:12 8 affidavit to the contrary, nor could he.

17:06:24 9 **THE COURT:** Well, you act like Lake demanded that
17:06:28 10 Zuckerberg produce handwriting samples. I don't understand what
17:06:32 11 that has to do with what we're discussing.

17:06:42 12 **MR. SNYDER:** No, I think paragraph 34 of document 97,
17:06:45 13 it's a August 4th declaration --

17:06:47 14 **THE COURT:** Maybe it's a wrong one. We have
17:06:51 15 Southwell. We unfortunately don't have a document on here --
17:06:55 16 it's 40-some paragraphs, is that it?

17:06:58 17 **MR. SNYDER:** Yes, Your Honor. It's 49 paragraphs.

17:07:01 18 **THE COURT:** Just tell me which one.

17:07:04 19 **MR. SNYDER:** Paragraph 34.

17:07:09 20 **THE COURT:** At the conclusion of that day, I then
17:07:12 21 discussed with Mr. Lake something about taking additional
17:07:17 22 samples. That's not the scenario that you've given me based on
17:07:22 23 the request of the Defendants' experts.

17:07:27 24 Impart because the Plaintiff's expert had already left
17:07:30 25 for the airport, Lake indicated we should wait to discuss this

17:07:34 1 problem, which was scheduled to occur after the Plaintiff's
17:07:37 2 experts took samples. That doesn't sound exactly like what
17:07:41 3 you're saying.

17:07:41 4 **MR. SNYDER:** Your Honor, if you read the last
17:07:41 5 paragraph --

17:07:44 6 **THE COURT:** Paragraph?

17:07:44 7 **MR. SNYDER:** Sentence. Mr. Lake agreed if there is
17:07:46 8 sufficient ink available after Plaintiff's experts also sample,
17:07:50 9 then he would allow Defendants' experts to extract more ink
17:07:55 10 samples.

17:07:55 11 **THE COURT:** I see that, but what I'm trying to point
17:07:58 12 out is the actual interruption of the -- the expert wanted to
17:08:01 13 take more so Mr. Lake suddenly jumped and said, well, no. I
17:08:02 14 need for us to have our person look at it and then your expert
17:08:07 15 said okay. So that's not exactly what's coming through here.
17:08:11 16 But I don't want to quibble over it.

17:08:13 17 The point is that your view is that you accommodated
17:08:16 18 Mr. Lake and to your chagrin you now find out that that was a
17:08:20 19 mistake.

17:08:20 20 **MR. SNYDER:** Yes, Your Honor. And the order does not
17:08:22 21 restrict our ability to take ink samples and there's more than
17:08:27 22 sufficient ink.

17:08:27 23 **THE COURT:** So I'm trying to understand something
17:08:28 24 that's not revealed in the papers as far as I can tell and that
17:08:32 25 is why does your expert feel at this point that the additional

17:08:37 1 samples are necessary.

17:08:40 2 **MR. SNYDER:** Because it is our expert's preliminary
17:08:44 3 belief, based on his initial samples --

17:08:46 4 **THE COURT:** No, no. You're not getting the drift
17:08:49 5 here. If he took five samples --

17:08:52 6 **MR. SNYDER:** Yes.

17:08:52 7 **THE COURT:** -- and needed 10, then his position would
17:08:55 8 be well I'm not done.

17:08:57 9 **MR. SNYDER:** Correct.

17:08:57 10 **THE COURT:** He's knows I have to get an additional
17:09:00 11 five samples.

17:09:01 12 **MR. SNYDER:** That's correct.

17:09:02 13 **THE COURT:** What I'm trying to understand is why.

17:09:04 14 **MR. SNYDER:** I'll telling Your Honor right now.

17:09:04 15 **THE COURT:** Okay.

17:09:07 16 **MR. SNYDER:** Because based on his initial sample,
17:09:10 17 whether it's five or four or nine, whatever the number is --

17:09:13 18 **THE COURT:** He wouldn't have known that at the time.

17:09:15 19 **MR. SNYDER:** No. Based on the initial sampling --

17:09:19 20 **THE COURT:** He wouldn't have known what his initial --

17:09:22 21 **MR. SNYDER:** Well, he would have known generally he
17:09:24 22 needed to take more than he took.

17:09:26 23 **THE COURT:** That's my point. What is the reason for
17:09:28 24 the need?

17:09:29 25 **MR. SNYDER:** I'm not an ink expert, but I'm told you

17:09:32 1 need more samples than he took to conduct the chemical testing
17:09:37 2 to determine whether the ink dates from 2003 or not.

17:09:39 3 **THE COURT:** I read that in his affidavit.

17:09:41 4 **MR. SNYDER:** Yes.

17:09:42 5 **THE COURT:** I understand that, but what's not in his
17:09:45 6 affidavit is what you're now trying to tell me which is that he
17:09:59 7 couldn't make any definitive estimations of the dating of the
17:09:59 8 ink because he didn't take enough samples in the first place.

17:09:59 9 **MR. SNYDER:** Because we accommodated the Plaintiff.

17:10:01 10 **THE COURT:** Exactly.

17:10:01 11 **MR. SNYDER:** Correct.

17:10:02 12 **THE COURT:** Whether he would have taken ill or whether
17:10:04 13 the power would have gone out and he would have to evacuate the
17:10:07 14 building, the fact of the matter is what you're telling me is
17:10:10 15 that he then knew and has always known that he needed X number
17:10:16 16 of samples, but he only took Y.

17:10:21 17 **MR. SNYDER:** Yes.

17:10:21 18 **THE COURT:** And he only took Y because he accommodated
17:10:26 19 Mr. Lake.

17:10:27 20 **MR. SNYDER:** Given the condition of the document also,
17:10:31 21 because it's been treated in a variety of ways that are highly
17:10:38 22 suspicious with light and perhaps chemicals, he did not know
17:10:40 23 that a certain test would be useful until he was able to further
17:10:45 24 evaluate the treatment of the paper as well.

17:10:48 25 **THE COURT:** So I'm fine with whatever his rational is

17:10:52 1 and if the real truth of the matter is that he took 10 samples,
17:10:57 2 say, and he then tested and found out that he needed 15, then
17:11:01 3 just tell me --

17:11:02 4 **MR. SNYDER:** That's not the case.

17:11:03 5 **THE COURT:** -- he always needed 15. He only took 10,
17:11:07 6 he took the test, he then evaluated the result and he said
17:11:12 7 ah-ha, I do need the additional five just as I knew I did when I
17:11:17 8 first started.

17:11:17 9 **MR. SNYDER:** It's actually both. It's both that he
17:11:20 10 needed more when he stopped testing and we on accommodated their
17:11:25 11 request to limit the number of --

17:11:26 12 **THE COURT:** And then he tested --

17:11:26 13 **MR. SNYDER:** And he was said I was right, I need more.

17:11:29 14 **THE COURT:** Okay, fine. Thank you. And it's because,
17:11:32 15 which is not in an affidavit, you have to represent hearsay here
17:11:36 16 to me, right?

17:11:36 17 He's telling you that in his scientific opinion is
17:11:41 18 this for the record because I really don't know the answer and
17:11:44 19 I'm sure that Mr. Lake is finding this of interest as well, his
17:11:49 20 preliminary testing confirmed that original judgement that I
17:11:52 21 just can't make a definitive determination without the
17:11:57 22 additional samples.

17:11:57 23 **MR. SNYDER:** Yes, he needs additional samples to --

17:12:00 24 **THE COURT:** Even though it wouldn't be clear to you or
17:12:04 25 I as to why the additional samples would be potentially

17:12:07 1 definitive upon dating the actual ink.

17:12:07 2 **MR. SNYDER:** I represent that to Your Honor and
17:12:10 3 Dr. Lyter represented it to me in person.

17:12:13 4 **THE COURT:** So we have to rely to the expert.

17:12:15 5 **MR. SNYDER:** And let me just say in terms of the
17:12:17 6 availability of ink samples, their expert --

17:12:20 7 **THE COURT:** Availability is beside the point. I'll
17:12:23 8 get to availability because I read all about availability.
17:12:28 9 Mr. Lake can respond to this, I just want to get this out.

17:12:31 10 As I read Mr. Stewart's affidavit, Mr. Stewart does
17:12:36 11 not in terms negate what we just discussed, that as if --

17:12:45 12 **MR. SNYDER:** We don't know if Mr. Stewart has
17:12:49 13 concluded about the ink, whether the ink is dry enough quote
17:12:52 14 unquote to be from 2003.

17:12:54 15 **THE COURT:** But there is nothing in his affidavit that
17:12:57 16 contradicts his representation to me about Mr. Lyter's opinion
17:13:03 17 that he needs the -- his focus, the Plaintiff's focus, is you're
17:13:08 18 going to destroy the document if you allow anymore samples.

17:13:12 19 **MR. SNYDER:** I would respectfully say, Mr. Stewart
17:13:15 20 does not say destroy.

17:13:17 21 **THE COURT:** And even though -- it is starting to
17:13:19 22 clarify in my mind what this is coming down to. Even though --
17:13:23 23 was Mr. Stewart present during this? Mr. Stewart never piped up
17:13:29 24 apparently during the process and said time-out. If you take
17:13:32 25 another attempt to take one more punch at this thing, you'll

17:13:36 1 destroy the integrity of the document.

17:13:38 2 **MR. SNYDER:** No, never. And he doesn't say destroy in
17:13:42 3 the affidavit.

17:13:42 4 **THE COURT:** Well, he is saying it now.

17:13:42 5 **MR. SNYDER:** He doesn't, Your Honor. It's actually
17:13:43 6 interesting, Mr. Stewart doesn't say that. It says something
17:13:43 7 that is so general that to repeat right now would be
17:13:43 8 meaningless.

17:13:49 9 He says that -- he doesn't say there's not sufficient
17:13:52 10 ink. There's tons of ink. He says that it will compromise the
17:13:57 11 physical integrity of the contract.

17:14:00 12 We have no idea what that means. It doesn't say there
17:14:03 13 is insufficient ink or anything like that. And during the
17:14:05 14 examination --

17:14:05 15 **THE COURT:** Okay. Mr. Lake, what's the answer to
17:14:08 16 that?

17:14:08 17 **MR. LAKE:** Your Honor, if you're going to deny them
17:14:11 18 anymore ink samples, I won't --

17:14:13 19 **THE COURT:** Well, I want to hear why there's a big
17:14:16 20 issue about it. Because if you look at Mr. Lyter's affidavit,
17:14:21 21 there surely does seem to be enough ink available without
17:14:27 22 compromising the physical integrity of the document.

17:14:31 23 And the other point I made is that in terms of getting
17:14:34 24 the correct samples in order for either expert to make a
17:14:39 25 scientific appraisal of the authenticity of the document based

17:14:41 1 on the age of the ink, Mr. Stewart does not in terms contradict
17:14:47 2 Mr. Lyter's assertion that -- well as reported to us now, I
17:14:51 3 guess in fairness to your -- to Mr. Stewart, he can't -- he
17:14:54 4 would not -- he's not here so it's probably not fair to ask you
17:14:59 5 that question. And I don't ask you that question.

17:15:03 6 But interestingly, he does not, and you did not
17:15:07 7 quarrel with the possibility of taking additional ink samples.
17:15:11 8 It must have been apparent to you that but for your request that
17:15:14 9 Lyter would have continued to draw additional ink samples at
17:15:18 10 that time. Is that not a fair reconstruction of the scenario?

17:15:30 11 **MR. LAKE:** No.

17:15:30 12 **THE COURT:** No?

17:15:30 13 **MR. LAKE:** Allow me to reconstruct it because actually
17:15:30 14 I was there and I participated in this. And I can speak for
17:15:30 15 myself, thank you.

17:15:31 16 What happened was we negotiated the physical hard copy
17:15:38 17 inspection to protocol. There was not a negotiation as to how
17:15:43 18 many ink samples could be taken or where for the simple reason
17:15:47 19 that we didn't have the original document.

17:15:48 20 And so after our meeting, we concluded that we would
17:15:52 21 try to meet and confer between the experts once they saw the
17:15:57 22 ink.

17:15:58 23 We went to Harris Beach, we had the experts meet and
17:16:02 24 confer. I was asked to provide a ink sample protocol, which
17:16:08 25 included the number -- and this was also true for the paper and

17:16:11 1 the toner, by the way. The number of samples that would be
17:16:14 2 taken and their locations.

17:16:16 3 I met with my experts and asked them what would be
17:16:19 4 necessary for them to conduct their tests. And therefore to
17:16:24 5 double that number so that the other side could have the same
17:16:28 6 number of samples and find places on the document where they
17:16:32 7 could take those samples. These are the black dots you've seen.

17:16:36 8 We wrote it up. We gave it to them. We had Mr. Flynn
17:16:41 9 and the other defense lawyers and their experts look at it.
17:16:41 10 They said this isn't enough. We want more.

17:16:46 11 And we said how much more do we want. And they came
17:16:50 12 back with a number and our experts says that's too much. We're
17:16:54 13 not going to be able to take the ink samples that we need if all
17:16:59 14 of these samples are taken.

17:17:01 15 We tried to negotiate a number. At that point we
17:17:05 16 couldn't agree. And I said okay. Well, fine at this point we
17:17:08 17 need to go see the Judge. Let's go see Judge Foschio. We can
17:17:13 18 present this to him and he can give us a ruling.

17:17:17 19 I did that, not because they were accommodating me,
17:17:21 20 but because I was concerned about the document itself. We
17:17:25 21 continued our meet and confer and came to the conclusion that we
17:17:28 22 would -- we wrote it up and we signed it.

17:17:32 23 It said we'll take this many samples because remember,
17:17:36 24 the Defendants were adamant that we couldn't touch our own
17:17:40 25 document until they were done with it. We weren't allowed to

17:17:44 1 test it. We weren't even allowed to watch them do their
17:17:45 2 testing. If we looked over that shoulder, they shooed us away.
17:17:49 3 If we were going to determine what they were going to do, that
17:17:51 4 was not going to happen.

17:17:51 5 I said either we need to go see the Judge right now
17:17:54 6 and get this sorted out or alternatively if you want to go
17:17:58 7 forward under the protocol that we devised and agreed to, if
17:18:03 8 after our experts have had a chance to take their ink samples,
17:18:07 9 which occurred days later in Chicago, if my experts agreed, then
17:18:14 10 I will allow it. That part is true.

17:18:16 11 In Chicago, we took our samples. The document looks
17:18:20 12 like Swiss cheese. As you can see, there is very little ink
17:18:25 13 left. That have had plenty to do it. They said we want to take
17:18:30 14 more. Mr. Argentieri was there. He got on the phone, talked to
17:18:32 15 our expert. Our expert says we have plenty, they have plenty.
17:18:35 16 The document is being --

17:18:41 17 **THE COURT:** Does your expert have more than they have?

17:18:43 18 **MR. LAKE:** No, we have the exact amount. And the
17:18:46 19 reason we didn't address some of the issues that Mr. Snyder just
17:18:50 20 brought up in our papers is because in their opposition and
17:18:53 21 reply, they never gave any good reason why they wanted more.
17:18:57 22 They just said there is more, therefore we want it.

17:19:00 23 They never said this is the test we want, this is why
17:19:02 24 we need it, this is what we're going to conduct, this is why we
17:19:04 25 don't have enough.

17:19:06 1 And the other thing they didn't mention is they have
17:19:09 2 two ink experts and they have not declared whether or not they
17:19:13 3 split the samples.

17:19:14 4 So if 10 ink samples were taken from one signature, at
17:19:18 5 this point I don't know if they have one person doing all their
17:19:20 6 ink testing or if they divided it to five and five and the
17:19:22 7 reason they want more is because they want 10 and 10.

17:19:26 8 All I know is that when we, to accommodate them, said
17:19:31 9 we either talk to the judge right now and get this sorted out or
17:19:36 10 you can take the amounts we agreed to and if our experts say
17:19:37 11 more, fine. If they don't, no. Our expert said no, so I said
17:19:40 12 no, which is exactly what I had maintained all along.

17:19:45 13 And then in their motion, all they basically said is
17:19:48 14 we want more. They didn't say if they were going to divide them
17:19:50 15 up, they didn't say what the tests were. They didn't say
17:19:50 16 anything so that's why I didn't respond to the arguments that
17:19:54 17 Mr. Snyder just made because they were never presented to us
17:19:57 18 even-keeled.

17:19:57 19 **THE COURT:** I realize it and that's why I am because I
17:19:59 20 couldn't tell either. But your expert is satisfied with the
17:20:03 21 number of samples they have?

17:20:06 22 **MR. LAKE:** Yeah, they've taken a ton. They've taken
17:20:10 23 dozens. I mean, there's ink samples taken all over the place.

17:20:15 24 And I don't understand what the good cause is for
17:20:18 25 taking more, other than they're not satisfied with the tests

17:20:22 1 that they conducted so far and they want to do more testing to
17:20:26 2 try to get different results. That's all I can think of.

17:20:30 3 **MR. SNYDER:** Your Honor, may I hand a document up to
17:20:44 4 Your Honor, which I think will clarify the question and I can
17:20:44 5 show Your Honor why.

17:20:44 6 I don't know if Your Honor is at all focused or
17:20:44 7 concerned about availability of ink, but that is a non-issue and
17:20:44 8 it really is and I'll show Your Honor why.

17:20:47 9 **THE COURT:** That's your expert's.

17:20:52 10 **MR. SNYDER:** If I can approach, Your Honor, I want to
17:20:55 11 give your Your Honor a different high-resolution copy of that,
17:20:58 12 which will show dramatically in color, and we'll give one to the
17:21:08 13 Plaintiff, just how much ink is left.

17:21:10 14 Those dots indicate where the ink was extracted. Your
17:21:14 15 Honor can see just how much ink is available.

17:21:17 16 **THE COURT:** How many more do they want to take and
17:21:20 17 where are they going to focus their pin prints?

17:21:24 18 **MR. SNYDER:** It is spelled out in Mr. Lyter's
17:21:29 19 declaration. And I will point out to the Court as well that we
17:21:29 20 have high-resolution scan of this document taken before any
17:21:37 21 testing was done. And so on paragraph --

17:21:43 22 **THE COURT:** Two more from the probably more critical
17:21:47 23 authenticity is of the initialing of the alleged
17:21:51 24 Mr. Zuckerberg's MZ and only one from the M and one from the Z.

17:21:56 25 **MR. SNYDER:** Yes. As you see from the authentic

17:21:59 1 contract found on the Plaintiff's email account in 2004, the
17:22:01 2 actual inter-lineage in the authentic contract is not the bogus
17:22:07 3 inter-lineage that is found on the document attached to the
17:22:10 4 complaint. And paragraph nine explains why we --

17:22:15 5 **THE COURT:** Say that again.

17:22:16 6 **MR. SNYDER:** If Your Honor looks at the authentic
17:22:19 7 contract that we found on the Plaintiff's hard drive on the
17:22:22 8 Seagate computer, Your Honor will see that the inter-lineation
17:22:26 9 there in handwriting on the actual authentic contract that's
17:22:31 10 been on Sidley and Austin's computer for seven years, having
17:22:36 11 been sent by the Plaintiff, is different than the handwriting
17:22:39 12 than appears on the fraudulent contract at the heart of this
17:22:43 13 lawsuit.

17:22:43 14 **THE COURT:** And I'm not going to attempt to make that
17:22:46 15 comparison. That would be the one that I would be most
17:22:51 16 concerned about is that that's such a small, relatively
17:22:55 17 speaking, lettering and it seems to be a major target.

17:22:59 18 **MR. SNYDER:** But, A, there is plenty of ink to test
17:23:04 19 and, B, there are high-resolution scans and there's no question
17:23:09 20 about --

17:23:09 21 **THE COURT:** I didn't ask that question. I come back
17:23:10 22 to the document. You know, Mr. Lake, if you look at the MZ over
17:23:15 23 here, have you seen this document? I'm pointing to the
17:23:19 24 high-resolution document which highlights that portion of the
17:23:23 25 contract dealing with a -- I can't even read what it says, but

17:23:27 1 it looks like initially PC and MZ, that doesn't seem like, does
17:23:34 2 it, if you took two more red dots on it that there's going to be
17:23:38 3 any physical serious impairment. Do you see what I'm getting
17:23:45 4 at?

17:23:45 5 **MR. LAKE:** I do, but keep in mind that for every
17:23:49 6 sample they take our experts are going to want to take --

17:23:52 7 **MR. SNYDER:** I thought that he didn't need more
17:23:56 8 samples.

17:23:56 9 **THE COURT:** I thought your experts were quite
17:24:00 10 satisfied, with your powerful argument, and they didn't need
17:24:01 11 more.

17:24:01 12 **MR. LAKE:** Yes.

17:24:01 13 **THE COURT:** You're now saying that your experts maybe
17:24:03 14 are suggesting there is more valid scientific proof to having
17:24:05 15 more samples?

17:24:05 16 **MR. LAKE:** No. So my choices are there's and ink and
17:24:09 17 they get to take it or you've had enough and they get to take
17:24:13 18 it.

17:24:13 19 **THE COURT:** Look, you know, I've been thinking about
17:24:15 20 this right along and since I first saw the issue, one
17:24:20 21 alternative would be for me to retain my own expert, at your
17:24:26 22 expense, I was hoping to avoid that, or to call the experts
17:24:29 23 tomorrow and let them be examined on the witness stand, and I
17:24:33 24 was hoping to avoid that by propounding the questions I
17:24:38 25 propounded to Mr. Snyder to get to the bottom of why these

17:24:43 1 additional samples are necessary.

17:24:44 2 On the one hand, if I -- if I error on your side, I'm
17:24:52 3 potentially compromising -- I've been asked to throw a dart in
17:24:55 4 the closet. You're compromising the Defendants' ability to
17:24:59 5 defend. And looking for the prejudice to your side from the
17:25:03 6 comment I just made in terms of seeing whether you -- it's hard
17:25:09 7 as a non-expert to see how there would be any compromising if
17:25:14 8 two more dots were made, but as you said, then your people would
17:25:17 9 need more if you're getting more.

17:25:20 10 But against that, you do have this whole high-profile
17:25:24 11 image that was done of this document to preserves ultimately for
17:25:28 12 the trier of facts the ability to assess what this looks like.

17:25:31 13 And I understand there's nothing like the best
17:25:34 14 evidence of the document itself. Arguably under the best
17:25:38 15 evidence rule, I don't know what will happen. You've got the
17:25:41 16 burden.

17:25:41 17 I don't know whether they'll stipulate weight that if
17:25:45 18 for some reason additional tests, if you will, would make this
17:25:54 19 -- potentially make it difficult for the trier of fact to
17:25:56 20 examine the physical document itself and assess it's
17:26:00 21 authenticity versus use of a copy of an image copy. I don't
17:26:10 22 know what the answer to that is, I'm trying to be fair.

17:26:16 23 In the absence of a -- well, of course in fairness you
17:26:21 24 didn't know what your position was going to be. Your expert
17:26:25 25 really hasn't had a chance to say whether he agrees or disagrees

17:26:27 1 with that and conceivably would need more samples.

17:26:28 2 **MR. LAKE:** We don't even know what tests -- the only
17:26:31 3 test that we know that they're planning on taking is a extremely
17:26:38 4 sensitive and precise chemical testing.

17:26:40 5 **THE COURT:** I assume you have to draw out a piece of
17:26:44 6 the paper with the ink for that.

17:26:46 7 **MR. SNYDER:** Mr. Stewart --

17:26:47 8 **THE COURT:** Although, all you're doing is putting some
17:26:50 9 sort of a, you know, magic x-ray on it or laser beam on it or
17:26:55 10 something.

17:26:56 11 **MR. SNYDER:** Mr. Stewart knows full-well what
17:27:06 12 testing --

17:27:06 13 **THE COURT:** Then you wouldn't compare the document at
17:27:06 14 all.

17:27:06 15 **MR. SNYDER:** Mr. Stewart knows full-well several
17:27:07 16 things because Mr. Lyter attests to it and Mr. Stewart doesn't
17:27:12 17 contest it.

17:27:13 18 He knows, first of all, that there are -- there is the
17:27:17 19 high-resolution scanned image. Second, forensic document
17:27:24 20 examiner often and commonly extract a great percentage of ink
17:27:25 21 available in the document than what we're proposing here.

17:27:29 22 And finally, in terms of burden, we've given -- and he
17:27:32 23 also knows full-well what chemical testing we want to conduct
17:27:35 24 because experts in this field know that there are certain
17:27:39 25 chemical tests that you do, that you perform, to test and date

17:27:44 1 ink and the concentration of various chemicals in the ink.

17:27:50 2 So he knows what tests we're going to conduct and he
17:27:54 3 knows that those are commonly performed and he knows that
17:27:57 4 document examiners often take much more ink than would be taken
17:28:01 5 here.

17:28:02 6 And if you look at our showing, it's specific and
17:28:05 7 focused and all he says is that it will compromise the physical
17:28:10 8 integrity of the document, which is meaningless.

17:28:13 9 We don't know what he means. Does that mean you're
17:28:16 10 not going to be read the writing? Does that mean -- it's a
17:28:19 11 meaningless verbiage.

17:28:20 12 **THE COURT:** Fine. Fine. Anything further?

17:28:22 13 **MR. LAKE:** Yes, Your Honor, a couple things. First,
17:28:26 14 just because they think that my expert may know what kind of
17:28:30 15 test they're conducting is not a good reason too tell us what
17:28:35 16 testing so we can respond this.

17:28:38 17 They do this a lot. They come back for a second bite
17:28:42 18 of the apple. They don't ask for a Gmail account and then they
17:28:42 19 come back and ask for it.

17:28:44 20 They -- we say we can come to the Court and come up
17:28:46 21 with a protocol for ink samples, but they'd rather do their test
17:28:51 22 and come back for more. We've seen this pattern over and over
17:28:53 23 so far they have been very successful with it.

17:28:57 24 Here's my concern: They're supposed to have their
17:28:59 25 reports out September 6th. If their expert report comes out

17:29:04 1 September 6th and says I didn't have enough ink --

17:29:05 2 **THE COURT:** Where does that date come from?

17:29:07 3 **MR. SNYDER:** That's in the old order. We're going to
17:29:10 4 need to address the date.

17:29:12 5 **THE COURT:** The July 1st order.

17:29:14 6 **MR. LAKE:** That's when their reports come out.

17:29:14 7 **MR. SNYDER:** September 9th is when, assuming
17:29:19 8 compliance, we were required to give our report.

17:29:21 9 **THE COURT:** Go ahead.

17:29:22 10 **MR. LAKE:** Anyway, they haven't shown to me any reason
17:29:29 11 to take it with specificity. They haven't shown any reason for
17:29:35 12 urgency. They haven't given any reason why they can't come back
17:29:39 13 after their report is issued and we can see what their experts
17:29:41 14 are actually saying instead of a declaration saying I want more
17:29:45 15 because I want more ink and I want to do some sort extremely
17:29:48 16 sensitive testing.

17:29:50 17 They have had an opportunity to come before this Court
17:29:52 18 before and they didn't. They had an opportunity to negotiate
17:29:56 19 protocol with our experts and they did. They had a opportunity
17:29:58 20 to take a lot of ink samples and they did. They had a chance to
17:30:03 21 conduct whatever tests they wanted on that ink and presumably
17:30:06 22 they did.

17:30:06 23 They are obligated to come up with their findings and
17:30:09 24 if their findings are that the tests that they did are
17:30:14 25 inconclusive or that the amount ink that they were able to

17:30:16 1 take --

17:30:17 2 **THE COURT:** Well, you should be actually heartened by
17:30:19 3 the fact that they are not conclusive.

17:30:21 4 **MR. LAKE:** We can infer that.

17:30:22 5 **THE COURT:** I think if they felt they had established
17:30:25 6 that these signatures and initialings are refabrications, they
17:30:30 7 would be done. They wouldn't be asking for additional samples.

17:30:33 8 But the fact that they feel the need for additional
17:30:35 9 samples, somebody might infer that they are having difficulty
17:30:38 10 reaching the conclusion that the Defendants would like them to
17:30:41 11 reach.

17:30:42 12 **MR. LAKE:** They've already admitted that the ink on
17:30:44 13 page two is from 2003. We know that because they're claiming
17:30:51 14 that the scan TIFF page two is what they like to call the
17:30:55 15 authentic contract --

17:30:56 16 **MR. SNYDER:** Your Honor, just to highlight a point --

17:30:59 17 **THE COURT:** That's why I focused on the MZ initials --

17:31:02 18 **MR. SNYDER:** Your Honor, if I could focus on this and
17:31:05 19 it's critical. What our experts have not concluded without any
17:31:09 20 question of clarity is that this document, they speak in terms
17:31:13 21 of likely, likely underwent artificial treatment, light, heat
17:31:19 22 and chemicals to create the appearance of a document that is
17:31:23 23 older than it is --

17:31:25 24 **THE COURT:** A document --

17:31:26 25 **MR. SNYDER:** -- to dry ink and to do other things.

17:31:30 1 That's why the ink testing is critical because it has to be seen
17:31:34 2 our request in the context of the other findings about what was
17:31:38 3 done to this document that creates this suspicious
17:31:46 4 golden-brownish ink and discoloration and all sorts of other
17:31:50 5 things --

17:31:50 6 **THE COURT:** So these additional things are focused on
17:31:54 7 that.

17:31:55 8 **MR. SNYDER:** No, it's focused on the ink.

17:31:55 9 **MR. LAKE:** They haven't presented that in any of their
17:31:57 10 motions or declarations or anything. How do I respond to that?

17:32:05 11 **THE COURT:** Do you think Mr. Stewart can rebut what he
17:32:08 12 just said if he's given a chance to?

17:32:10 13 **MR. LAKE:** He's talking about artificial aging. He's
17:32:14 14 not talking about why they're going to take ink samples.

17:32:22 15 **THE COURT:** I meant to ask this question about the age
17:32:25 16 of the documents. What's the name of the law firm that he
17:32:28 17 mailed this original document to?

17:32:30 18 **MR. SNYDER:** He emailed it to Sidley and Austin, which
17:32:33 19 is an international firm based in Chicago, in March of 2004.

17:32:39 20 **THE COURT:** That's Mr. Cole?

17:32:41 21 **MR. SNYDER:** Mr. Cole. He emailed the authentic
17:32:47 22 contract. Mr. Cole was actually a member of StreetFax, LLC and
17:33:01 23 it's unclear --

17:33:01 24 **THE COURT:** Whether he was even being consulted as an
17:33:01 25 attorney.

17:33:01 1 **MR. SNYDER:** What we do know --

17:33:01 2 **THE COURT:** Well, he was, but he wasn't being
17:33:02 3 consulted as an attorney.

17:33:04 4 **MR. SNYDER:** At least on the face of the email he
17:33:06 5 certainly wasn't.

17:33:07 6 **THE COURT:** So it wasn't as if Mr. Ceglia didn't have
17:33:10 7 a professional relationship with Sidley and Austin.

17:33:14 8 **MR. SNYDER:** He had a professional relationship with
17:33:17 9 Mr. Cole. We're not aware --

17:33:18 10 **THE COURT:** A business relationship.

17:33:19 11 **MR. SNYDER:** We're not aware of what the relationship
17:33:23 12 was or wasn't. We're aware that Sidley and Austin has the
17:33:24 13 authentic contract on its email server and it's been sitting
17:33:27 14 there since 2004. That we are aware of. A fact that
17:33:31 15 Mr. Ceglia --

17:33:31 16 **THE COURT:** Mr. Cole was operating as a business
17:33:34 17 person, but using law firm facilities?

17:33:36 18 **MR. SNYDER:** We don't know.

17:33:36 19 **MR. LAKE:** Your Honor, all of these assertions are
17:33:41 20 being made by Mr. Snyder today. We have not seen any
17:33:44 21 declarations along these lines. We have not taken any
17:33:48 22 depositions. We have not had any documents produced. All we
17:33:51 23 have had is whatever Mr. Snyder has --

17:33:51 24 **THE COURT:** One of the reasons for the accelerated
17:33:54 25 discovery in the first place was to get at the bottom of the

17:33:57 1 allegation that this is a fraud and that's what we're going to
17:34:00 2 do.

17:34:00 3 **MR. SNYDER:** And on that point, Your Honor, there is
17:34:03 4 something --

17:34:03 5 **THE COURT:** Or not. There is a reasonable question of
17:34:04 6 fact about it.

17:34:05 7 **MR. SNYDER:** There is something about the Sidley and
17:34:09 8 Austin question that we want to address to Your Honor, which we
17:34:14 9 think is highly pertinent --

17:34:15 10 **THE COURT:** Can I rule first?

17:34:15 11 **MR. SNYDER:** Yes.

17:34:16 12 **THE COURT:** I'm granting the Defendants' request for
17:34:18 13 the reasons stated, put that in your order as well, per
17:34:25 14 Mr. Lyter's request -- limited to Mr. Lyter's request.

17:34:29 15 **MR. SNYDER:** Three brief things, Your Honor. First,
17:34:32 16 on the Rule 11 certification, that's been unopposed --

17:34:33 17 **THE COURT:** No, no. Are you able to draft some
17:34:36 18 language in the order agreeing to that?

17:34:37 19 **MR. SNYDER:** Yes.

17:34:38 20 **THE COURT:** When are you going to do that?

17:34:40 21 **MR. SNYDER:** We'll get that to you by 5:00 p.m.
17:34:45 22 tomorrow.

17:34:45 23 **THE COURT:** 10:00 a.m.

17:34:46 24 **MR. SNYDER:** 10:00 a.m. tomorrow.

17:34:46 25 **THE COURT:** Right.

17:34:47 1 **MR. SNYDER:** Whatever Your Honor says.

17:34:50 2 **THE COURT:** And what about the date for the ultimate
17:34:54 3 disclosure?

17:34:54 4 **MR. SNYDER:** There are two things, Your Honor. We
17:34:56 5 would say that right now under the old order that assumed
17:35:03 6 compliance --

17:35:03 7 **THE COURT:** Just tell me what the new date is.

17:35:05 8 **MR. SNYDER:** We could put that in the order. Sometime
17:35:09 9 later in September.

17:35:17 10 **THE COURT:** The order calls for you advising the Court
17:35:21 11 the results of the report, all reports documenting the
17:35:26 12 examination of the hard copy documents and electronic access.

17:35:32 13 **MR. SNYDER:** We would like to submit the report which
17:35:35 14 will likely be a motion.

17:35:36 15 **THE COURT:** I'm not inviting your motion.

17:35:39 16 **MR. SNYDER:** 30 days after the Plaintiff complies with
17:35:42 17 the order, which we anticipate will be sometime later in
17:35:45 18 September.

17:35:46 19 **THE COURT:** 30 days after they comply?

17:35:48 20 **MR. SNYDER:** Yes.

17:35:48 21 **THE COURT:** Now, how are those going to physically
17:35:51 22 comply? They have to get the document out of the safety deposit
17:35:56 23 bank and meet you somewhere?

17:35:56 24 **MR. ARGENTIERI:** I believe Dr. Lyter can come to
17:36:02 25 Hornell. He brought the equipment to Buffalo.

17:36:04 1 **THE COURT:** Well, whatever you can work out.

17:36:04 2 **MR. FLYNN:** We did all the testing at Harris Beach, we
17:36:10 3 can do it there again.

17:36:11 4 **MR. LAKE:** We did that to accommodate them. If they
17:36:16 5 want to take more testing, the documents in Hornell.

17:36:18 6 **MR. ARGENTIERI:** It's not going to take very long,
17:36:21 7 Judge. It's just going to take maybe an hour to take these
17:36:24 8 samples.

17:36:24 9 **MR. FLYNN:** You accommodated us --

17:36:27 10 **THE COURT:** Somebody's going to have to drive.

17:36:29 11 **MR. ARGENTIERI:** I just said Dr. Lyter.

17:36:29 12 **MR. SNYDER:** This Plaintiff had filed a lawsuit in
17:36:37 13 this district, it's in this district --

17:36:37 14 **MR. ARGENTIERI:** It is in the district.

17:36:39 15 **THE COURT:** Wherever you do it, where did you -- do it
17:36:44 16 at Harris and Beach just like you did the other testing. Put
17:36:50 17 that in the order.

17:36:50 18 Now, quickly because --

17:37:02 19 **MR. SNYDER:** Two things quickly. To Rule 11
17:37:06 20 certification is unopposed and we're going to put that in the
17:37:10 21 order --

17:37:10 22 **THE COURT:** I don't understand that. Why don't you
17:37:12 23 just make a motion, if you feel so inclined? And can under
17:37:15 24 second circuit law there be a dismissal be of a sanction?

17:37:18 25 **MR. SNYDER:** Yes, under this Court's inherent power --

17:37:23 1 **THE COURT:** Well, no, I'm talking about Rule 11.

17:37:23 2 **MR. SNYDER:** Rule 11 -- we believe these two attorneys
17:37:23 3 who are appearing in this case and have not yet signed a
17:37:28 4 pleading should be required to certify pursuant to Rule 11 --

17:37:29 5 **THE COURT:** Look, I understand what Rule 11 says. I'm
17:37:32 6 just trying to get at this.

17:37:33 7 **MR. SNYDER:** They could be personally sanctioned for
17:37:36 8 maintaining --

17:37:37 9 **THE COURT:** And the Plaintiff can be sanctioned in
17:37:40 10 effect by having the case dismissed.

17:37:43 11 **MR. SNYDER:** Correct, but he can also be personally
17:37:46 12 sanctioned under other rules of the Court.

17:37:46 13 **THE COURT:** I just want to focus on the Rule 11. Why
17:37:51 14 can't you simply -- why do you need me to direct them to show
17:37:54 15 cause of why they shouldn't be held in violation of Rule 11 when
17:37:59 16 Rule 11 has its own very discreet procedural requirements? I
17:38:09 17 just want to understand why it's part of this motion.

17:38:09 18 **MR. SNYDER:** Because we believe --

17:38:09 19 **THE COURT:** You can make the motion on your own. You
17:38:16 20 don't need my permission --

17:38:16 21 **MR. SNYDER:** If these gentlemen would agree that they
17:38:18 22 would not oppose the Rule 11 motion on the basis that they have
17:38:23 23 not signed a plea, then we would not require a Rule 11
17:38:27 24 certification.

17:38:28 25 But we believe that having not signed the amended

17:38:33 1 complaint, Mr. Argentieri did not sign it, that these men may
17:38:37 2 have as a defense if we move for sanctions under Rule 11, that
17:38:41 3 they didn't sign a plea --

17:38:41 4 **THE COURT:** I thought you cited case law that the Rule
17:38:48 5 11 breaches subsequently appearing counsel who is relying on an
17:38:58 6 advocate -- who advocates on and relies on from a previously
17:39:01 7 filed document. I thought you told me that was prevailing case
17:39:13 8 law.

17:39:13 9 **MR. SNYDER:** We did.

17:39:13 10 **THE COURT:** If that's true, why couldn't you just make
17:39:13 11 a motion? Why do you have to get me involved at this point?

17:39:13 12 **MR. SNYDER:** Because we believe having consulted civil
17:39:15 13 procedure experts that the better practice, and many judges
17:39:19 14 require that subsequently appearing attorneys certify under Rule
17:39:24 15 11 that they have a reasonable basis to prosecute a complaint
17:39:28 16 that they haven't signed.

17:39:30 17 And we would have no request for this if they would
17:39:32 18 simply in open court represent to Your Honor that they would not
17:39:37 19 oppose Rule 11 motions on the grounds that they didn't
17:39:40 20 physically sign the amendment.

17:39:42 21 But I can assure, Your Honor --

17:39:42 22 **THE COURT:** If they say that on the record, then you
17:39:42 23 won't make the ruling?

17:39:45 24 **MR. SNYDER:** Correct. I can assure they won't say it
17:39:47 25 on the record though.

17:39:49 1 **THE COURT:** Do you want to respond to that?

17:39:51 2 **MR. LAKE:** All I can say --

17:39:53 3 **THE COURT:** Excuse me. I'm not going to force an
17:39:56 4 officer of the Court to say things that they don't want to say.
17:39:59 5 You heard me. If he wants me make a motion, it's just one more
17:40:05 6 motion. If you want to avoid that by making some statements on
17:40:10 7 the record, feel free, but I'm not directing you to.

17:40:11 8 **MR. LAKE:** Your Honor, I've tried to avoid being here
17:40:14 9 today. I've tried to comply with everything they've asked for.
17:40:18 10 So far, everything that I've done has been rejected and there's
17:40:22 11 been motions filed all along the way.

17:40:22 12 If they're filing a Rule 11 motion, they're going to
17:40:25 13 do it anyway. They might as well just file their motions just
17:40:28 14 like they've filed everything else.

17:40:28 15 **THE COURT:** All right. That request is denied without
17:40:32 16 prejudice.

17:40:32 17 **MR. SNYDER:** The final thing, Your Honor, is that we
17:40:35 18 would request that Your Honor permit us to issue a subpoena to
17:40:40 19 Sidley and Austin tomorrow.

17:40:41 20 **THE COURT:** Is that in the papers?

17:40:43 21 **MR. LAKE:** No.

17:40:43 22 **MR. SNYDER:** No, this is a new request, Your Honor.
17:40:46 23 But it is because we just discovered on the Sidley and Austin
17:40:51 24 email severer the authentic complaint.

17:40:54 25 Your Honor has overruled any privileged objections to

17:40:59 1 that, those emails, and the attachments, any confidentiality
17:41:01 2 objections. I spoke to Sidley and Austin --

17:41:04 3 **THE COURT:** Can we take the ADR issue first? I was
17:41:07 4 waiting for you to tell me that you're moving for me to --
17:41:13 5 excuse me. No, that's their motion. I'm sorry. It is your
17:41:18 6 turn. I apologize.

17:41:19 7 **MR. SNYDER:** So sitting on the Sidley and Austin sever
17:41:22 8 is the authentic contract and the two emails to that attachment.

17:41:25 9 **THE COURT:** Well, it's a document that you claim is
17:41:28 10 the authentic document.

17:41:29 11 **MR. SNYDER:** Sidley and Austin is prepared to --

17:41:32 12 **THE COURT:** Why don't they?

17:41:33 13 **MR. SNYDER:** Because they want a subpoena, they're a
17:41:35 14 law firm. And there was litigation about its confidentially and
17:41:39 15 the privileged nature so we either want an order permitting them
17:41:44 16 to turn over in light of the overruling of the privilege and
17:41:50 17 confidentiality objection to --

17:41:52 18 **THE COURT:** What about Rule 45?

17:41:53 19 **MR. SNYDER:** We would like to issue a subpoena, but
17:41:55 20 there is a stay of discovery, except as ordered by this Court so
17:41:58 21 we would civilly request that we be permitted to issue a
17:42:02 22 subpoena.

17:42:02 23 **THE COURT:** Pursuant to Rule 45.

17:42:03 24 **MR. SNYDER:** Pursuant to Rule 45. They will produce
17:42:04 25 to the Plaintiff and the to Defendant the emails and attachments

17:42:09 1 which the Plaintiff already produced on his computers to us so
17:42:15 2 we can --

17:42:15 3 **THE COURT:** Does Mr. Lake know about this?

17:42:18 4 **MR. SNYDER:** Yes, he does because he called Sidley and
17:42:22 5 Austin and was trying to interfere with their giving us that
17:42:25 6 document.

17:42:26 7 **MR. LAKE:** Oh, come on. Are you kidding?

17:42:28 8 **MR. SNYDER:** I'm not kidding.

17:42:31 9 **MR. LAKE:** I got a call from somebody I've never met
17:42:34 10 and I returned a call. That's all I've done. I haven't talked
17:42:35 11 to anyone.

17:42:35 12 **THE COURT:** So you deny that you interfered?

17:42:38 13 **MR. LAKE:** Yeah.

17:42:39 14 **THE COURT:** So you oppose the request?

17:42:41 15 **MR. LAKE:** Of course.

17:42:42 16 **THE COURT:** Because?

17:42:43 17 **MR. LAKE:** Because we have a stay on discovery because
17:42:43 18 we're trying to get through the expedited discovery and when
17:42:46 19 that's done, if they want to file a subpoena then they can.

17:42:49 20 **THE COURT:** Why do you need it as part of expedited
17:42:52 21 discovery on the purpose of whether this is a fabrication or
17:42:56 22 not?

17:42:56 23 **MR. SNYDER:** Because sitting on the Sidley and Austin
17:43:00 24 computer server since 2004 is the StreetFax contract which is
17:43:00 25 the authentic and completely dissimilar to the contract attached

17:43:06 1 to the complaint.

17:43:06 2 **THE COURT:** Well, how does getting that help you to
17:43:09 3 prove fabrication?

17:43:10 4 **MR. SNYDER:** It's proof positive that the Plaintiff in
17:43:15 5 2004 described his contract with Mark Zuckerberg to be a
17:43:20 6 StreetFax contract, the copy of which we have says nothing
17:43:23 7 about --

17:43:23 8 **THE COURT:** You already know that this document that's
17:43:26 9 on their can the computer storage system is what is it is. The
17:43:30 10 Plaintiff's saying --

17:43:30 11 **MR. SNYDER:** The Plaintiff says.

17:43:31 12 **THE COURT:** They disclosed and it's not privileged per
17:43:35 13 my order. And Mr. Lake has not able to -- or not pursuing this
17:43:42 14 issue. And Judge Arcara --

17:43:43 15 **MR. SNYDER:** Mr. Lake has said to Your Honor --

17:43:45 16 **THE COURT:** So I'm not sure what --

17:43:46 17 **MR. SNYDER:** -- and the Plaintiff has said to the
17:43:49 18 world that we planted that on their computer. Getting it from
17:43:53 19 Sidley and Austin is the death nail in the argument because it's
17:44:00 20 been on their computer for seven years.

17:44:03 21 **MR. LAKE:** How do we know that?

17:44:04 22 **THE COURT:** How do we know that? Well, I suppose
17:44:06 23 that's a fair question, but it doesn't really answer whether he
17:44:10 24 should be entitled to get whatever is out there at this time and
17:44:14 25 make whatever arguments he wants to make about it.

17:44:16 1 If Sidley and Austin want to pursue a cross motion in
17:44:22 2 the district of Chicago, we can issue a subpoena out of that
17:44:24 3 district under Rule 45, I believe.

17:44:27 4 **MR. SNYDER:** Or this one. We can issue it here or
17:44:38 5 there. 100 miles.

17:44:38 6 **THE COURT:** Well, Chicago's more than 100 miles away.

17:44:47 7 **MR. SNYDER:** They just need a subpoena. That's it.

17:45:04 8 **THE COURT:** I don't see any harm in it. The request
17:45:06 9 is granted and proceed accordingly. It wouldn't affect the
17:45:13 10 September disclosure on expert testimony.

17:45:27 11 **MR. SNYDER:** No. And on that, Your Honor September
17:45:27 12 9th was the date in original order and what we request is that
17:45:27 13 we make our report to the Court 30 days after compliance.

17:45:32 14 **THE COURT:** I think 30 days is fine. All right.
17:45:41 15 Let's finish up. One further request from the Plaintiff.

17:45:44 16 **MR. LAKE:** This case was ordered for mediation before
17:45:47 17 I became involved.

17:45:52 18 **THE COURT:** I don't know how that could have happened.
17:45:55 19 It wasn't referred to me until after the remanned issue was
17:45:59 20 resolved. We'll find out in a second.

17:46:05 21 **THE CLERK:** It was automatically referred to mediation
17:46:09 22 July 9th, 2010.

17:46:11 23 **THE COURT:** Was that when the referral was made?

17:46:13 24 **THE CLERK:** No, no. The notice of removal from state
17:46:17 25 clerk to here it's automatically referred to mediation.

17:46:21 1 **THE COURT:** I see.

17:46:22 2 **THE CLERK:** So whenever it's active.

17:46:25 3 **THE COURT:** I understand. I would not have expected
17:46:28 4 that because of the remanded motion, but whatever.

17:46:31 5 **MR. SNYDER:** It was a stay of Rule 16 though, Your
17:46:35 6 Honor, that was issued subsequently.

17:46:37 7 **THE COURT:** This mediation operates on a -- but it's
17:46:41 8 not stay discovery.

17:46:41 9 **MR. SNYDER:** No.

17:46:43 10 **THE COURT:** So what's your concept here?

17:46:45 11 **MR. LAKE:** My concept here is if you believe
17:46:48 12 everything that you heard today --

17:46:49 13 **THE COURT:** Yes.

17:46:49 14 **MR. LAKE:** -- that this case should resolve and that
17:46:53 15 we should begin --

17:46:53 16 **THE COURT:** Why do you say that?

17:46:55 17 **MR. LAKE:** Because the Plaintiffs are at the pinnacle
17:46:57 18 of where they believe they will be.

17:46:59 19 **THE COURT:** No, I don't have to believe everything
17:47:01 20 that they've said is true. What I have to believe is that there
17:47:05 21 is a colorable basis that is sufficient to proceed with this
17:47:09 22 accelerated discovery and that's all I have found.

17:47:13 23 **MR. LAKE:** Okay.

17:47:14 24 **THE COURT:** I don't believe anything at this point as
17:47:16 25 far as this case is concerned. I believe the Defendant has made

17:47:20 1 out enough of a showing to warrant accelerated discovery and
17:47:25 2 that's all I have found.

17:47:25 3 **MR. LAKE:** Okay. Fair enough and thank you. I
17:47:28 4 appreciate that.

17:47:28 5 The reason I made that request is because despite the
17:47:37 6 Defendants' continued position that they will litigate this case
17:47:40 7 until their death unless they get a dismissal of prejudice.

17:47:44 8 I think every client, not attorney, but actual client
17:47:46 9 needs to determine whether or not any litigation is based and
17:47:49 10 should be resolved as a matter of principal or as a matter of
17:47:53 11 economics.

17:47:54 12 And that if the Plaintiffs are truly in the position
17:47:56 13 that they believe they are in at this moment, that they should
17:47:59 14 invite mediation.

17:48:06 15 **THE COURT:** Defendants.

17:48:06 16 **MR. LAKE:** Defendants, excuse me. True for the
17:48:09 17 Plaintiff too. We are about to conclude --

17:48:09 18 **THE COURT:** You're the one that's raised it so I'm
17:48:13 19 assuming that you are requesting it?

17:48:15 20 **MR. LAKE:** Right.

17:48:15 21 **THE COURT:** That's the way I read your papers.

17:48:17 22 **MR. LAKE:** Right. And what I was going to say is that
17:48:18 23 we are about to conclude the expert --

17:48:19 24 **THE COURT:** Why don't we have that request in front of
17:48:25 25 us before we go on?

17:48:26 1 **MR. LAKE:** We should have. If I was here, I would
17:48:28 2 have made it.

17:48:31 3 **THE COURT:** Well, you were.

17:48:31 4 **MR. LAKE:** No, I came in the day the motion, if you
17:48:34 5 recall. All the papers were filed by the time I got here.

17:48:35 6 **THE COURT:** There was no mention of it.

17:48:40 7 **MR. LAKE:** No.

17:48:40 8 **THE COURT:** Was that on your mind.

17:48:42 9 **MR. LAKE:** It's always on my mind.

17:48:44 10 **THE COURT:** At that time?

17:48:45 11 **MR. LAKE:** At that time we hadn't conducted the
17:48:48 12 discovery and I hadn't had an opportunity to even review the
17:48:50 13 case file from the lawyers. I was completely in the dark.

17:48:53 14 **THE COURT:** Fair enough. Fair enough.

17:48:54 15 **MR. LAKE:** If you recall, I was in the case 48 hours.

17:48:58 16 **THE COURT:** Mr. Ceglia had confident counsel
17:49:02 17 throughout and Mr. Argentieri is here and we appreciate that, he
17:49:04 18 is what was the name of the law firm that filed the --

17:49:07 19 **MR. LAKE:** DLA Piper.

17:49:11 20 **THE COURT:** Is that formally Piper Marbury perhaps?

17:49:15 21 **MR. LAKE:** Yes. They merged with Gray Carey and
17:49:18 22 another firm.

17:49:19 23 **THE COURT:** They certainly knew about the ADR and made
17:49:24 24 no effort to launch that.

17:49:26 25 **MR. LAKE:** As Mr. Snyder very correctly pointed out, I

17:49:32 1 can't speak for them.

17:49:32 2 **THE COURT:** I understand.

17:49:33 3 **MR. LAKE:** So my request is this: We are about to
17:49:37 4 conclude the expedited portion of the discovery. We are about
17:49:40 5 to begin a full-blown discovery effort on our own upon the
17:49:45 6 Defendants.

17:49:45 7 **THE COURT:** No, you aren't because there's a stay, is
17:49:47 8 that not true?

17:49:48 9 **MR. LAKE:** Once that's done, we'll have our Rule 26
17:49:52 10 and --

17:49:52 11 **THE COURT:** You have request to it or you'll have a
17:49:54 12 Rule 16. Or we're going to have a motion, at least that's what
17:49:58 13 I'm gathering, that is going to confront me pretty soon.

17:50:02 14 **MR. LAKE:** That's exactly my point. Why should we go
17:50:05 15 through all that if this case can resolve. We don't know that
17:50:06 16 unless the clients have an opportunity to decide how they want
17:50:08 17 to pursue at this time.

17:50:10 18 I think we're at a critical juncture. I think this is
17:50:13 19 a good time that if the Plaintiff truly believes in their
17:50:15 20 decision they can assert that in a mediation, then why don't we
17:50:17 21 give a shot at resolving this case? If it's a matter of
17:50:23 22 principal --

17:50:23 23 **THE COURT:** Do you have an answer to that?

17:50:25 24 **MR. LAKE:** If it's a matter of economics --

17:50:28 25 **MR. SNYDER:** Yes, Your Honor.

17:50:29 1 **THE COURT:** I realize that we do have a mediation
17:50:32 2 program. I had not understood that this case had already been
17:50:35 3 referred to it. People don't need the Court's mediation to
17:50:39 4 mediate obviously.

17:50:41 5 **MR. SNYDER:** To be clear, my client has no interest in
17:50:45 6 mediating or resolving this case. We believe that this case is
17:50:49 7 a serious and egregious fraud on the Court that goes not only to
17:50:55 8 the integrity of the judicial process, but has victimized my
17:51:04 9 clients, their employees, their shareholders and the public.

17:51:04 10 There is no basis for mediation. We believe this case
17:51:07 11 will be ripe for dismissal upon Plaintiff's compliance with the
17:51:12 12 expedited discovery order.

17:51:13 13 We believe that there will be no basis under
17:51:16 14 controlling second circuit law for full-blown discovery given
17:51:21 15 the fraud in the Court that has been presented to the Court and
17:51:24 16 will be presented to the Court and the other discovery of uses
17:51:28 17 and misconduct --

17:51:29 18 **THE COURT:** Those have nothing to do with mediation.

17:51:32 19 **MR. SNYDER:** And therefore, there is no need to
17:51:36 20 mediate because we will not, my clients, settle or resolve this
17:51:40 21 case short of the Plaintiff dismissing the case with prejudice
17:51:45 22 and even then we might not consent to that unless they pay costs
17:51:52 23 and attorney fees.

17:51:53 24 **MR. LAKE:** Your Honor, if he's saying that --

17:51:55 25 **THE COURT:** You would not consent to what?

17:52:00 1 **MR. SNYDER:** We're not going to consult with my client
17:52:05 2 because we don't even consent to a dismissal with prejudice of
17:52:05 3 attorney fees and cost.

17:52:08 4 Meaning to say, if they were prepared tomorrow to
17:52:12 5 dismiss this case with prejudice, as long as we waive fees and
17:52:13 6 cost, I know that Mr. Stretch and I would have a long
17:52:18 7 conversation has he would with his principals about whether that
17:52:20 8 was acceptable to us.

17:52:21 9 **THE COURT:** I understand. Again, I don't want to be
17:52:24 10 too technical, especially at the hour we're at here, but there
17:52:27 11 is no motion to opt out of mediation, it has been literally --
17:52:35 12 in Judge Arcara's order, literally right from the beginning.

17:52:40 13 So on the other handled I suppose that we've stayed
17:52:44 14 discovery and we stayed the --

17:52:46 15 **MR. SNYDER:** And we understood, Your Honor, the ADR
17:52:48 16 deadlines being tied to Rule 16 under the Court's order, which
17:52:54 17 is why we assumed that everything had been stayed but that which
17:52:59 18 is the proceeding pursuant to Your Honor's order.

17:53:02 19 **THE COURT:** I understand.

17:53:02 20 **MR. LAKE:** Your Honor, if he is saying his client is
17:53:04 21 unwilling to negotiate this case in good faith, we know where we
17:53:10 22 stand. We are willing to sit down and be open and honest and be
17:53:15 23 frank --

17:53:15 24 **THE COURT:** Well, why didn't you do that without a
17:53:18 25 mediator?

17:53:19 1 **MR. LAKE:** Because if we have a mediator here, then we
17:53:22 2 are going to be under mediation contact. If defense counsel
17:53:27 3 wants to me meet with me privately.

17:53:31 4 **THE COURT:** I'm not speaking out of turn here, but
17:53:33 5 obviously the parties can always settle a case. All you have to
17:53:37 6 do is send Mr. Snyder a demand.

17:53:40 7 **MR. LAKE:** Right, but I think with the presence of a
17:53:45 8 mediator it would go a long way. And if Mr. Zuckerberg is
17:53:48 9 personally unwilling to attend, then we can talk about that and
17:53:51 10 have him available --

17:53:51 11 **THE COURT:** Mr. Ceglia would come in from Ireland.

17:53:55 12 **MR. LAKE:** If Mr. Zuckerberg will be here, he'll be
17:53:57 13 here. If they want to --

17:53:58 14 **THE COURT:** You didn't answer the question.
17:54:00 15 Mr. Ceglia will come in from Ireland? Is he changing his
17:54:01 16 domicile or something? Are you able to say?

17:54:04 17 **MR. LAKE:** Well, I can't speak to that, but I will
17:54:07 18 tell you that if the Court orders the parties to a mediation
17:54:11 19 that he will be here to resolve the case.

17:54:14 20 **THE COURT:** Is it is a extended vacation in Ireland.

17:54:18 21 **MR. LAKE:** You'd have to ask him that.

17:54:18 22 **THE COURT:** I thought you might know.

17:54:21 23 **MR. LAKE:** I've talked to him about resolution and if
17:54:26 24 Mark Zuckerberg and Facebook are serious about resolving this
17:54:29 25 case, there are many, many good reasons and if I can make that

17:54:31 1 presentation to the Defendants and we have a mediator, I think
17:54:32 2 we can give a good run in resolving this case.

17:54:36 3 If they don't want to do that, they made that
17:54:38 4 statement, they want the case to go to the end of the appeal
17:54:41 5 process, now we know. Now it will go forward. I'm offering
17:54:46 6 this: Negotiate in good faith. We're willing to do it now.
17:54:51 7 Whatever they want to do.

17:54:52 8 **THE COURT:** You wouldn't be willing to do that after
17:54:55 9 the expert reports are in?

17:54:57 10 **MR. LAKE:** I think now is the best time to do that
17:55:02 11 and not just for my benefit, but for the defense's benefit
17:55:05 12 because there is a lot of information that we have that is
17:55:08 13 about to come out. And I think they have the benefit to settle
17:55:12 14 now too.

17:55:12 15 **THE COURT:** You have information that's about to come
17:55:15 16 out? What do you mean by that?

17:55:17 17 **MR. LAKE:** I think once we conduct discovery and we
17:55:20 18 turn over the information that we know exists that --

17:55:22 19 **THE COURT:** I'm talking about the expert testimony.

17:55:25 20 **MR. LAKE:** Oh, our experts have done testing too,
17:55:28 21 sure. They're going to be able to respond to their report and
17:55:31 22 our experts have certainly conducted their investigation as
17:55:34 23 well, sure.

17:55:35 24 **THE COURT:** That's right. The order doesn't right
17:55:37 25 them to report it, only requires --

17:55:39 1 **MR. SNYDER:** We will be filing a motion so the rules
17:55:42 2 will kick into gear and they will have their response time. And
17:55:46 3 what we anticipate is that we will be filing a motion which
17:55:50 4 we'll attach as declarations or affidavits the findings of our
17:55:55 5 experts as it is relevant to the filing of fraud.

17:55:58 6 **MR. LAKE:** Well, then the question of course is if
17:55:59 7 that is filed I will be under the presumption that their expert
17:56:02 8 report is going to be deemed confidential and not be made
17:56:05 9 available to the press because it includes information that is
17:56:09 10 the result of protected discovery.

17:56:13 11 **MR. SNYDER:** We can address that down the line. Yeah,
17:56:15 12 we disagree, but it's not right for presenting now.

17:56:19 13 **THE COURT:** Are you saying that a mediation order for
17:56:23 14 this time would be futile?

17:56:34 15 **MR. SNYDER:** Futile. We have no interest in mediating
17:56:34 16 or settling this case. Period. With no disrespect to the Court
17:56:34 17 or its process.

17:56:35 18 **THE COURT:** All right. Well, it puts me in a little
17:56:39 19 awkward position because the program does contemplate mediation
17:56:41 20 after the motion to opt out, but there's been no motion to opt
17:56:43 21 out.

17:56:43 22 But considering that we're operating in a unusual
17:56:48 23 procedure here with how with this started with the accelerated
17:56:54 24 discovery, I'm reluctant to order a mediation procedure at this
17:56:58 25 time.

17:56:59 1 I'll take another look at it after the expert reports
17:57:02 2 are filed and see where we're at. I'm not foreclosing it, but
17:57:06 3 listening to Mr. Snyder, I don't want to waste anybody's time.
17:57:10 4 That request is denied for the reason stated.

17:57:14 5 Anything further on behalf of the Plaintiff, Mr. Lake?

17:57:16 6 **MR. LAKE:** I don't think so.

17:57:17 7 **THE COURT:** Anything else for the Defendants,
17:57:20 8 Mr. Snyder?

17:57:21 9 **MR. SNYDER:** No, thank you, the Court, for its time.

17:57:21 10 **THE COURT:** Well, thank you for bearing with me and
17:57:30 11 we'll look forward to that order to come in tomorrow.

12 **MR. LAKE:** Thank you, Your Honor.

13 (Proceedings concluded at 5:57 p.m.)

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DIRECTCROSSREDIRECTRECROSSWITNESSES FOR THE
GOVERNMENT

None

WITNESSES FOR THE
DEFENSE

None

EXHIBITSMARKEDRECEIVEDGOVERNMENT 'S

None

DEFENDANT 'S

None

1 "I certify that the foregoing is a correct transcript from the
2 record of proceedings in the above-entitled matter."

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4 S / Jolene Lamphier
5 Signature

August 22, 2011
Date

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7 JOLENE LAMPHIER
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